In the Supreme Court of the United States.

OCTOBER TERM, 1911.

UNITED STATES OF AMERICA, THE CINCINNATI & COLUMBUS TRACTION COMPANY, and Interstate Commerce Commission, intervenor, appellants,
v.
THE BALTIMORE & OHIO SOUTHWESTERN Railroad Company and the Norfolk & Western Railway Company.
} No. —.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled cause for hearing.

The appeal is from a final order or decree of the Commerce Court entered April 19, 1912, annulling and enjoining an order of the Interstate Commerce Commission of December 13, 1911.

The following questions, among others, are involved:

1. Whether the line of railroad extending from Hillsboro, Ohio, on the east, to Norwood, Ohio, on

the west, and owned and operated by the Cincinnati & Columbus Traction Company, a corporation organized and operated under the laws of the State of Ohio as an electric interurban railway and a common carrier of freight and passengers for hire, is a lateral branch line of railroad within the meaning of the act to regulate commerce.

2. Whether the Interstate Commerce Commission has the power to order and require the Baltimore & Ohio Southwestern Railroad Company to maintain and operate during a period of not less than two years a switch connection with the said Cincinnati & Columbus Traction Company for the transportation of interstate traffic to and from the line of said traction company, at or near Hillsboro, Ohio, the expense of installing such connection to be borne by the said traction company.

3. Whether the Interstate Commerce Commission has the power to order and require the Norfolk & Western Railway Company to maintain and operate during a period of not less than two years a switch connection with the Cincinnati & Columbus Traction Company for the transporting of interstate traffic to and from the line of the said traction company at or near Hillsboro, Ohio, the expense of installing such connection to be borne by the said traction company.

4. Whether the Interstate Commerce Commission has the power to order and require the Baltimore & Ohio Southwestern Railroad Company and the Norfolk & Western Railway Company, according as their

various lines may run, to establish and put in force, and to maintain for a period of at least two years, through routes to and from interstate points to and from all points on the line of the Cincinnati & Columbus Traction Company between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of traffic under through billing and through charges based upon the rates of the respective railroad companies to and from the junction points established by the order of the Interstate Commerce Commission.

Public interests are involved, and the priority suggested is authorized by section 2 of the act of June 18, 1910 (36 Stat. 539, 542).

Counsel for appellees concur.

F. W. LEHMANN,
Solicitor General.

MAY, 1912.

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No. 648.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, CINCINNATI & COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

CHARLES W. NEEDHAM,
Assistant Solicitor for Interstate Commerce Commission.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912

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CASES CITED.

STATUTES.

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No. 648.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

This case involves a decision of the Interstate Commerce Commission holding that the Cincinnati & Columbus Traction Company, one of the appellants herein, is, as to the appellees herein, a "lateral" railroad, within the provision of section 1 of the act to regulate commerce.

STATEMENT OF THE CASE.

This is an appeal from the final decree of the United States Commerce Court in a suit brought by the appellees, petitioners in said Commerce Court, to

prevent the enforcement of two orders made by this appellant, hereinafter called the Commission, requiring the appellees (1) to establish, and maintain for two years, switch connections with the Cincinnati & Columbus Traction Company for the transfer of interstate traffic, and (2) to establish, and for two years maintain, through routes to and from interstate points to and from all stations between and including Boston and Dodsonville, on the line of the Traction Company. The orders were entered on the 13th day of December, 1911, in one decree, and are set forth in full on page 4 of the printed transcript of record herein. The report of the Commission, upon which the order was entered, is to be found upon pages 8 to 16, inclusive, of the transcript of record herein. The first order—requiring switch connections—was made under the provisions of section 1 of the act to regulate commerce, as amended June 18, 1910. The second order—requiring through routes to certain stations—was made under the provisions of section 15 of said act, as amended.

The proceedings before the Commission were instituted upon a complaint by the Cincinnati & Columbus Traction Company, a corporation, organized under the laws of the State of Ohio as an electric railway for the transportation of passengers and freight, as a common carrier, between Columbus and Cincinnati in said state. Its railroad as now constructed and operated extends from Norwood, a suburb of Cincinnati, to Hillsboro, Ohio, a distance of about 53 miles; its line is wholly within the State of Ohio and belongs

to the class commonly referred to as "interurban" electric roads; its complaint before the Commission was filed on January 21, 1909. The complaint, and the evidence taken by the Commission, showed that prior to the filing of the complaint on November 12, 1908, the Traction Company served a written notice on each of the appellees herein demanding that they establish, or permit to be established, switch connections and through routes and joint rates for the interchange of interstate traffic. (Record, pp. 10, 11.) This request being refused, the complaint was filed before the Commission as stated, and the appellees, upon due notice, appeared and contested the right of the Traction Company to have the relief prayed for.

During the pendency of the proceeding before the Commission this honorable court rendered its opinion in *Interstate Commerce Commission* v. *D., L. & W. R. R. Co.* (216 U. S., 531), holding that the Commission could only grant switch connections with lateral roads, under the act as then existing, upon the complaint of shippers. While the proceedings before the Commission were pending and undetermined, certain shippers on the line of the Traction Company addressed letters to the Commission, and gave evidence upon the hearing which, it was held by the Commission, had the effect of joining them in the complaint. (Record, pp. 10, 11.)

Subsequent to the decision by this honorable court cited above, and prior to the determination of the case by the Commission, Congress, by act approved June 18, 1910, amended section 1 of the act, and

provided that the Commission should have power to order a switch connection "upon application of *any lateral, branch line of railroad or* of any shipper tendering interstate traffic for transportation," etc.

After the amendment of the act, the case before the Commission was reopened, and set down for rehearing and argument. (Record, p. 3.)

The case was finally determined by the Commission upon the complaint of the Traction Company, joined in by certain shippers, and under the act as amended. (Report of the Commission, record, pp. 10, 11.) Subsequent to the report the Traction Company filed with the Commission its schedule of local rates to be applied to interstate traffic. (Com.'s Rept., record, p. 16, and petition, record, p. 2.)

The appellee, the Baltimore & Ohio Southwestern Railroad Company, is a consolidated corporation, organized under the laws of Ohio and Indiana, and operating a line of railway extending across said states, the State of Illinois and into the State of Kentucky (petition, record, p. 1). Its line passes through Hillsboro, Norwood and Cincinnati, in the State of Ohio, and it is a carrier of interstate commerce. Between the city of Cincinnati and Hillsboro the line of this appellee makes a detour to the north into Warren and Clinton Counties, returning southerly to Hillsboro in Highland County. (See map, record, p. 8.) The appellee, the Norfolk & Western Railway Company, is a corporation organized under the laws of Virginia, operating an interstate railroad through parts of Ohio, West Virginia,

Kentucky, Virginia, Maryland, North Carolina and Tennessee. It also passes through Cincinnati and Hillsboro, making a detour to the south in the counties of Claremont and Brown, to Sardinia, thence northerly to Hillsboro. (Map, record, p. 8.) This left a large territory, about 15 miles across at its widest section, without railroad facilities. In this territory were villages whose inhabitants could only reach the railroads of appellees by a wagon haul varying from 5 to 10 miles over country roads. The Traction Company line pursues generally a middle and more direct course from Norwood to Hillsboro, and supplies this territory with railroad facilities. (Map, p. 8.) In addition to its local business the Traction Company transports interstate freight and passengers from this territory, but without the benefits of switch connections or through routes and through rates, transferring its traffic either at Norwood or Hillsboro by independent transfers, at the expense of the shippers, to the railroads of the appellees. To facilitate this interstate traffic the Traction Company and shippers asked to have (1) switch connections at Norwood and at Hillsboro upon which to make transfers without expense to shippers; and (2) through routes and joint rates to facilitate the interstate business.

After a full hearing at which the appellees and each of them appeared and submitted evidence, briefs and arguments, and after a physical examination of the several roads and their connections by the Commission, the Commission filed its report in writing, stating

its findings and conclusions, upon each branch of the case, as required by the act, and entered the orders in controversy. The orders required the appellees to establish the switch connections, and the through routes, on or before the 15th day of February, 1912, and to maintain them for two years thereafter. The appellees filed their petition in the United States Commerce Court on January 22, 1912, and a preliminary injunction staying both orders of the Commission was issued.

The United States filed a motion to dismiss the petition. (Record, pp. 20, 21.) The Commission intervened and filed an answer to the petition. As the Commerce Court in its opinion determined the case upon the sole ground that the traction line was not a lateral railroad the answer of the Commission was afterwards, on February 17, 1912, withdrawn by leave of the court, and the Commission joined in, and adopted the motion of the United States to dismiss the petition. The Traction Company also appeared as an intervening respondent, and joined in the motion of the United States to dismiss the petition.

The respondents elected to stand by the motion to dismiss. The Commerce Court rendered its opinion on April 9, 1912 (record, pp. 25 to 31), and on the 19th day of April entered a final decree overruling the motion to dismiss for the reasons stated in the opinion of the court, and perpetually enjoined the enforcement of both the orders in question, treating them as one order. From this decree an appeal was taken to this court.

ERRORS ASSIGNED.

Several questions were raised in the Commerce Court which that court did not determine for the reasons stated in the opinion as follows:

> These are serious objections which would have to be carefully considered except for the conclusion which we have reached on the underlying question, viz, whether the Traction Company's road is a "lateral, branch line of railroad" within the meaning of the statute, which, if found against that company, is conclusive. (Record, p. 28.)

And, treating the two orders as dependent upon the question decided, the court further said:

> Without undertaking, therefore, to further define a "lateral, branch line of railroad" we are clearly of opinion that the road of this Traction Company does not come within any reasonable meaning of the language used in the statute to describe the class of roads entitled to a switch connection. And if we are right in this view, the Commission was without jurisdiction to make the order in question.
>
> "A preliminary injunction was therefore properly ordered and the motion to dismiss will be overruled." (Record, p. 31.)

This being the only issue upon which the opinion and decree of the Commerce Court was based and from which an appeal was taken, the assignment of errors, several in number (record, pp. 34 to 36), may be stated under two general propositions:

(1) The court erred in holding that the Cincinnati & Columbus Traction Company is not a lateral,

branch line of railroad, as to the lines of the appellees, within the meaning of section 1 of the act.

(2) The court erred in holding that the Commission did not have power to enter the orders in question:

(*a*) Requiring the switch connections, and

(*b*) Establishing through routes to part of the stations on the Traction Company's line.

BRIEF AND ARGUMENT.

I.

The purpose of the act and its application to the Traction Company.

The Traction Company is a common carrier engaged in the transportation of interstate commerce, its line extending from Norwood to Hillsboro, about 53 miles in the state of Ohio; it serves a territory and shippers who are making shipments to points in other states, and receiving shipments from points in other states. These shipments to and from this territory pass over the Traction Company's line to appellees' lines, and there, either at Norwood or at Hillsboro, are transferred by hand or truck, and proceed on their interstate journey. The expense of the transfers is either in the local freight rate or is a special charge paid by the shippers. Delay is occasioned by these primitive methods of transferring interstate freight, which works to the disadvantage of the shippers. To remedy these defects in interstate transportation facilities the Traction Company and the shippers requested that switch connections be made at each end of the traction line and that

through routes be established. The advantages to the shippers in having the switch connections are, (1) that transfers of less than carload lots can be made directly through the freight station by switching cars containing the shipments to the connecting carrier, without unreasonable delay, and without expense to the shipper; and (2) in case of carload lots, the transfer can be made by switching the car to the connecting line and its movement continued to point of destination. To secure the full benefit of these advantages, through billing over a through route is desirable. Where freight is billed through by a common carrier over connecting lines, all transfers, both as to less than carload lots and carload lots, are made by the carriers, unnecessary delays are prevented, and the territory served is put upon a reasonable equality with other producing and consuming territories.

The purpose of the act.—It is one of the purposes of the act to regulate commerce, as amended, to extend interstate facilities to every producing or consuming territory having "sufficient business to justify the construction and maintenance of" switching connections. No other purpose can be suggested for the provision in Section 1, as amended, providing that these connecting facilities shall be granted by the great trunk lines to the small lateral branch lines of railroad serving the smaller communities. To the big line of railroad these smaller streams are important, draining into its channel the traffic from a larger territory than is adequately served by its main line. When these lateral roads, however, are

of the electric type, a type just coming into extended use and competition with the steam roads, decided opposition is presented by the steam roads against the doing of anything that will put the electric roads upon an equality with the steam roads. This opposition has been pressed upon and met by the Commission in many ways. The Commission, however, has taken the view, obtained from the clear reading of the statute, that Congress recognized and intended to recognize the development of electric roads, especially for short lines into new territory; and while the statute provides that through routes and joint rates may not be established between steam railroads and a street electric passenger railway, it is clear that these interurban roads, carrying both freight and passengers, differing mainly from the steam roads in the motive power used, are now to be treated as a part of the great transportation system of the country. They are especially adapted, because of less expense in construction and operation, to serve the smaller rural communities not properly or adequately served by steam roads. But this service to the rural community will not be complete unless interstate shipments can be made over these lines in connection with the trunk lines carrying the great volume of interstate traffic.

The Traction Company in this case serves a community not large, but having a sufficient traffic to warrant the switch connection. Communities are not overlooked by the state because they are small. The only question involved, under the statute, upon

this point is whether there will be sufficient traffic to warrant the expenditure occasioned by a switch connection. This is a question of fact about which due investigation was made by the Commission, and its finding upon this fact is clear and conclusive. (Record, at the bottom of p. 11 and top of p. 12; *I. C. C.* v. *D., L. & W. R. R. Co.*, 220 U. S., 235.)

II.

Definition of lateral railroads.

The terms "lateral railroad" and "branch railroads" or "lateral branch railroads", occur frequently in special charters and general incorporation acts. In fact, until the incorporation of this phrase into the act to regulate commerce by Congress, it occurs in judicial opinions only in connection with condemnation cases, and the inquiry in these cases has been to ascertain whether the railroad company had the power under its charter, or a general act of incorporation, to build a lateral or branch railroad of a given kind or character. In all these cases the connection was made with the main line.

> It is true, as claimed by appellant, that whether a particular portion of a railway is a branch railroad or not does not depend upon its length or direction; but it must be connected with a main line, or constructed, in order to be such. (*Calling* v. *Griffin*, 56 Pa. State, 305; *1 Wood Railway Law*, section 189; *Biles* v. *Tacoma O. & G. H. R. R. Co.*, Supreme Court of Washington, Jan. 3, 1893, 32 Pacific Reporter, 211.)

And that:

> A lateral road is another name for a branch road; and a lateral or branch road is one which proceeds from some point on the main trunk between its termini, and is an appendage to and properly a part of the main road. *Newhall* v. *G. C. U. R. R. Co.*, 14 Ill., 273; *C. & E. I. R. R. Co.* v. *Wiltse*, 116 Ill., 449; *L. S. & M. S. Ry. Co.* v. *B. & O. & C. R. R. Co.*, 149 Ill., 272.

These cases differ from those arising under the act to regulate commerce in this, that the lateral lines referred to in the state cases were already connected with the main line and in that respect were "branches," while cases arising under the act to regulate commerce involve an order directing that a connection be made; after the connection is made they are in a sense branches or connecting lines. In all cases, however, the question of what constitutes a "lateral" road is the same.

The following cases are instructive in so far as they define the word "lateral" and show the disposition of the courts to give in each case force and effect to the spirit and purpose of the law.

The Supreme Court of Pennsylvania had before it a case involving the exercise of the power of eminent domain to construct an extension from the terminus of the Pittsburgh-Thomasville Railroad. The company was authorized "to survey, locate and construct one or more branches of railroad, extending from any point or points in any county through or in

which said main line passes, or in any adjoining county, with a view to the development of the territory within said limits, and furnishing an outlet for its production." The court said:

> Is the proposed extension a branch within the meaning of the act? We think it is. We can not agree that the definition of such a structure shall depend either upon its length or direction * * * The mistake is found in giving too narrow a definition to the word "branch." * * * The branching power given by the 9th section of the act of 1868 is sufficiently broad and comprehensive to authorize the construction of the road in question as a branch and there is no valid reason why it may not be constructed from the terminus as well as from any other point of the main line of the road.
>
> *McAboy* v. *Pittsburgh, etc., R. R. Co.*, 107 Pa. St., 558; American and English Ry. Cases, Vol. 20, p. 314.

In another case in the Supreme Court of Pennsylvania construing a statute which provided that, "Any company incorporated under this act shall have authority to construct such branches from its main line as it may deem necessary to increase its business, and accommodate the trade and travel of the public." Held:

> The main line, although less than four miles long, connects the Baltimore & Ohio and the Philadelphia & Reading systems, and thus becomes an important piece of road, over

> which a large amount of traffic must necessarily pass. * * *
>
> It is not necessary that we should discuss the difference between a branch and an extension. * * * We are clear that this is a branch, and that its character as such is in no sense affected by the incident that, to reach its objective point, it makes a detour that increases its length over that of the main line.
>
> Vollmer's appeal, 115 Pa. St., 166; 8 At. Rep., 223.

A case in the Supreme Court of West Virginia, brought to condemn a right-of-way to construct a branch or branches, was considered. The statute of West Virginia provided: "Any railroad company organized under this chapter may build and construct lateral and branch roads or tramways."

The proposed branch connected with another branch of the main line. The court said:

> Nothing is clearer under our statute than that the railway company may legally construct a branch of a branch, or, that two branches may have a common stem leading into the main line, provided neither exceed fifty miles in length from such main line.
>
> *Wheeling Bridge & T. Co.* v. *Camden C. Oil Co.*, 35 W. Va., 205; 13 S. E. Rep., 369.

The statute of New Jersey provided: "That whenever the railroads of any railroad corporations * * * intersect of cross each other, or shall approach each other within a distance of one mile, * * * it shall be lawful for either corporation to determine

upon constructing a branch railroad or railroads so as to effect such connection."

The Court of Errors and Appeals of New Jersey said:

> It is no objection to the legality of the proposed branch railroad that it will leave the main line on one side of the connection and return to it on the other. * * * The authority is to construct "a branch railroad or railroads so as to effect such connection" and a connecting loop is within the authority.
>
> *Attorney General* v. *Greenville & H. Ry. Co.*, 62 N. J. Eq., 768; 48 At. Rep., 568.

The Court of Appeals of Maryland considering a clause in the charter of the Baltimore & Ohio Railroad Company which authorized "lateral railroads, in any direction whatsoever, in connection with said railroad from the City of Baltimore to the Ohio River," said:

> The learned judge of the Circuit Court reached the conclusion that the proposed road was not a lateral railroad * * * and stated "any branch, therefore, from the main line that is not a feeder of the port of Baltimore is not a lateral railroad as contemplated in the charter. * * * I do not believe from the evidence that the proposed branch will be a feeder of the main line between Baltimore and the Ohio River."
>
> The testimony taken in this case shows that the proposed road will run through a territory without east and west railroad facilities, and that it will cross and connect with the Western

Maryland and Northern Central and the Maryland and Pennsylvania railroads, thereby interchanging traffic with all these roads, both giving and receiving it, and directly tending to develope the trade and transportation of the region it traverses. Yet, upon the theory adopted below, these connections can not be made under the charter. But that this was not the policy of the State in granting this charter appears to us to be conclusively shown by section 23 * * *.

But we have yet to inquire what is the true meaning of the term "lateral railroad". In most of them [charters] the same general power is given to construct lateral roads and in many the language used is very nearly the same. * * * In *Newhall* v. *Galena & Chicago Union R. R. Co.*, 14 Ill., 273, the court said: "A lateral road is one proceeding from some point on the main trunk between its termini. This is a road lateral to and proceeding from the main road. This is a simple fact. Ingenuity can not remove or disprove it."

B. & O. v. *Waters*, 105 Md., 39; 66 At. Rep., 685.

In the Supreme Court of Virginia a question arose as to the right to condemn land to connect the main line of the Richmond, F. & P. R. R. Co. with the Richmond & Petersburg Railroad Co., under a provision of the company's charter which provided, that the company "may make or cause to be made, branches or lateral railroads, in any direction whatsoever, in connection with the said railroad, not exceeding ten miles each in length."

The court said:

> What is a lateral or branch road? The word "lateral," according to Webster means "proceeding from the side; as, the lateral branches of a tree; lateral shoots;" and this I take it is the sense in which this word is to be understood when we speak of branch or lateral railroads. A lateral railroad is nothing more nor less than an offshoot from the main line or stem. * * *
>
> It seems to us, however, perfectly clear that we should hold in accordance with the unbroken current of decisions, as well as upon principle, that the mere fact that the contemplated road runs in the same general direction with the main track will not deprive it of the character of a branch or lateral road.
>
> * * * Upon what principle, then, can we hold that because of the mere circumstance that this branch road connects those two railroads that it ceases to be a branch or lateral road and is not authorized by the charter? We know of none. It may be that this right to make of a branch road a connecting link between two railroads may have been one of the unforeseen results of the grant of power, but as it does not change the terminus, serves as a feeder to the main stem, assists the company to develop the country through which it passes, and tends to promote the public convenience, both as to trade and travel, it can not be regarded as obnoxious to any of the objections that have been urged against it.
>
> *Blanton* v. *Richmond*, F. & P. R. R. Co., 86 Va., 618; 10 S. E. Rep., 925.

This court in a case involving the validity of certain bonds issued to aid in the construction of a branch road said:

> It [the railroad] was expressly authorized "To extend *branch* railroads into and through *any* counties that the directors may deem advisable." For the purpose of aiding in the construction by that company of a road from the junction of the main line with the Pacific Railroad, extending in a northeasterly direction to Booneville, through the county of Howard, the county court of that county, in its behalf and after a favorable vote by the people, made a subscription to the capital stock of the company and issued county bonds therefor. * * *
>
> The subscription was made and bonds issued, in pursuance of a provision in the company's charter which made it "lawful for the county court of any county in which any part of the railroad or *branches* may be, or any county adjacent thereto, to subscribe to the stock of said company * * * and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay the same and to take proper steps to protect the interest and credit of the county court;" * * * The railroad was constructed through Howard County as proposed and has been in operation ever since. * * *
>
> And now it is contended in behalf of the county, and no other question is presented for determination, that there was no legal authority for this subscription or issue of bonds.

> The argument in its behalf is that the main road of the company was established on a line south of the Pacific Railroad; that Howard County could not, by subscription, aid in the construction of the main line; and could not, by subscription, aid in the construction of a road from the junction of the main line northeasterly through that county, because such a road would not be a *branch* road but only an unauthorized *extension* of the *main* line.
>
> We are of opinion that the road constructed through Howard County was, within the meaning of the statute, a branch of the original or main line.
>
> *Howard County* v. *Bank*, 108 U. S., 314.

Observe how in each case above cited, the court rendering the decision lays emphasis upon the fact that the lateral road may connect at any point with the main line and becomes a lateral road by reason of its being (*a*) a feeder to the main line, and (*b*) that it tends to develop the trade and transportation of the region it traverses. In the Maryland case emphasis is laid upon the fact that it connects with other railroads and so furnishes to the territory which it traverses railroad connections, thereby promoting the public convenience both as to trade and travel.

The provisions of section 1 of the act to regulate commerce are clear and explicit:

> Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any

shipper tendering interstate traffic for transportation, *shall* construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, or where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; * * *

If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section 13 of this act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money. (Concluding paragraph section 1, as amended.)

The clear purpose, and object in view, in this statute was the same as in the statutes construed in the cases above cited, namely, to develop trade and

commerce and accomodate the shippers in communities and territories not otherwise provided, or not adequately provided, with railroad facilities. No other purpose can be conceived for this legislation. This purpose then should dominate the construction to be given to the word "lateral" as used in the act.

In discussing the second ground of complaint, the commission, in its report, said:

> None of these towns is within less than approximately five miles, and two or three are ten miles or more by the country roads from any station on the defendant lines. To say that such places are already reasonably well served by either of the defendants is to announce the definite proposition that a wagon haul of from five to ten miles is not an improper burden to put upon an interstate shipper. But in such a view we are not ready to concur as a fixed rule, even when the country roads are so good as the roads in this territory are said to be. While we have little sympathy with, and will not ordinarily lend our aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates, we shall not permit the theory as to what traffic is tributary to a road to be pushed to such an extreme as to impose an undue burden upon shippers. Confining our ruling to the special facts of the case and to the points last mentioned, we think the prayer for through routes should be granted.

This description of the communities in the territory traversed by the Traction Company, when read in the light of the facts in the cases above cited, shows satisfactorily that the Traction Company's line is performing important service for shippers in a territory not otherwise adequately provided with railroad facilities.

That these towns are small and that the Traction Company's line is a minor road, does not impress the case. The words of Mr. Justice Johnson in Gibbon *v.* Ogden (9 Wheaton 1, 196) are appropriate. He said:

> The great and paramount purpose [of the Constitution] was to unite this mass of wealth and power for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means.

While the main purposes of the act to regulate commerce, as stated by this court in several opinions, is to prevent discrimination and favoritism between shippers and localities and to secure reasonable interstate rates, it is also the purpose of the act to extend interstate commerce to every community, by uniting and using all existing instrumentalities, and by raising all agencies to the highest efficiency.

This provision in section 1 of the act refers to minor or smaller lines of railroad; it has no reference to junctions between the great trunk lines. It is intended to secure, as the words clearly indicate, a current of commercial and industrial life to out-

lying communities which are served by these short and less important lines. The underlying question really is whether or not a community is already served by interstate commerce, or whether they are adequately served.

It is a mistake to regard these minor lines simply as small feeders to the main line as though they were created for the benefit of the larger railroad. The act to regulate commerce, while not antagonistic to railroads, and properly construed means their development and growth, is primarily for the purpose of building up the population and wealth of every community within the State. The main lines of transportation are the great arteries of commercial and industrial life, and send this life out through the "branches" to smaller communities. The word "lateral" therefore, as used in this statute, does not depend upon particular direction, or point of contact, or non-competition; but it does mean, properly defined and construed, a line which reaches a territory not adequately served by the main arteries. The time was in the history of the country when a wagon haul over country roads of five or ten miles to a railroad was not regarded as so very disadvantageous, but we have reached the point in competition and extension of trade when it is essential to the development of every community that it should have at its door the best possible means of interstate transportation; and it is to secure this that the statute seeks, in all proper cases, to compel the great lines of railroad to make connection with these lateral lines in

order that every part of the State may be served in the most advantageous manner by these great instrumentalities of interstate commerce.

This honorable Court in the case referred to, Interstate Commerce Commission *v.* D. L. & W. R. R. Co., (216 U. S., 521, 537) while not deciding the point in issue in this case, certainly recognized in the language used, the thought here expressed. Mr. Justice Holmes, speaking for the Court, said:

> There certainly is force in the contention that the words of the statute mean a railroad naturally tributary to the line of the common carrier ordered to make the connection, and dependent upon it for an outlet to the markets of the country, * * * but primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch.

In this case it is also recognized that the purpose of the statute was primarily to serve the shippers; and under the statute as it then read this court held that only shippers could ask for such a connection. Since that decision was rendered Congress, recognizing the fact that the lateral road, in such a matter, represented the shippers, amended the act so as to provide that the complaint might be filed by the lateral road. It still remains true, however, that the primary purpose of the act is to serve the shippers in a given territory who are not otherwise properly served.

Taking this view and giving this broad construction to the statute, the commission had power to

order in the switch connections, provided each connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same."

Whether the connection is practicable and safe, and whether there is sufficient business to warrant the expense, are questions of fact. Regarding the determination of these facts the act provides, "that the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor." These are not questions of law for the court to determine. As stated by this court in I. C. C. *v.* D. L. & W. R. R. Co. *supra*, "the statute creates a new right not existing outside of it"; and it provides a tribunal that is to determine the questions of fact.

This court has said, in several cases, that in the determination of these questions of fact arising under the act the conclusions of the Commission are final and not reviewable by the Commerce Court.

> *Baltimore & Ohio R. R.* v. *Pitcairn* (215 U. S. 481).
>
> *Int. Comm. Comm.* v. *D. L. & W. R. R.* (220 U. S. 235, 251).

Upon these questions of fact the Commission, after reviewing the evidence presented by the parties before it, and making a physical examination of the roads and their relation to each other for the purpose

of determining the practicability of the connection and the operation thereof, found as follows:

> A physical connection with the defendant, the Baltimore & Ohio Southwestern, at one time existed at Madeira and also at a point spoken of in the record as Hillsboro Junction. At the same time there was also a connection with the line of the Norfolk & Western at the latter point. * * * It is not to be doubted that it is reasonably practicable to restore these connections at those points or to put connections in elsewhere, or that when restored or put in elsewhere they can be operated with safety. Nor can it be doubted that there will be sufficient traffic to and from points on the line of the complainant reasonably to compensate the defendants for constructing, maintaining, and operating such switch connections with the complainant. (Record, pp. 11 and 22.)

The Commission further found:

> In conclusion we find that the complainant is entitled to a switch connection with the line of the defendant, the Baltimore & Ohio Southwestern Railroad Company, at Medeira, and to a switch connection at or near Hillsboro with the line of that defendant, as well as with the line of the Norfolk & Western Railway Company. (Record, pp. 15 and 16.)

And in the order it is provided:

> The expense of installing such connection to be borne by said complainant [the Traction Company].

The learned judge who wrote the opinion of the Commerce Court fell into a singular error by failing to discriminate between the two divisions of the case—the request for switch connections and the request for through routes, either one of which might have been the subject of a separate proceeding. The first complaint is under section 1, which provides for switch connections, the second is under section 15, which provides for through routes. There is no connection or interdependence between these two causes of action. Relief may be granted in either one without reference to the other; switch connections may be ordered in without any reference to the existence or nonexistence of through routes. Through routes may be established, and do exist, where there is no physical connection between the lines, the transfers being made by steamboats, lighters, trucks or other instrumentalities. Facts essential to relief in one case need not exist as to the other. The Commission discussed and determined each complaint separately as clearly appears in the report. Yet in the opinion of the Commerce Court (Record, p. 30) it is stated:

> In considering whether upon this showing the Cincinnati & Columbus Traction Company is a lateral branch railroad, within the meaning of the law, it is to be observed that, according to the test applied by the Commission, it is held to be such as to places and shippers along its line in the intermediate territory between Dodsonville and Boston, remote from and not sufficiently served by the trunk lines,

> but not as to those east or west of there, as the road approaches its termini, where this is not the case. But it is obvious that this is not and can not be the correct criterion. A road is or is not a lateral branch railroad, according to the relation which it bears to the line with which a switch connection is asked. And this relation is one of road to road, and not of shippers or territory. (Record, p. 30.)

The Commission applied no such test. It took up in its report, first, the application for a switch connection, considered the road as a whole, and reached its conclusions thereon independently and before considering the needs of particular stations for through routes. (Record, p. 12.) The Commission then proceeds to say: "The complainant *also demands*, as we understand the petition, through routes and through rates to and from all interstate points reached by the defendants' lines and their connections." It then considers the condition of the particular stations and discusses their needs for through routes; examines to see whether they have adequate through route connections over the main lines, *not with a view of determining whether the line of the Traction Company is a "lateral" line, but for the purpose of determining whether the Commission should order in through routes at these stations.* The Commerce Court evidently misconceived the nature and scope of the proceedings before the Commission and the purpose of the inquiry under each complaint.

The opinion of the Commerce Court proceeds upon another theory, which, if correct, would prevent connection with any lateral road. After calling attention to the fact that for some distance from each connection the stations or communities are severally served by the main line, the opinion says:

> For half this distance also one or other of the steam roads draws its local traffic from and serves substantially the same territory as the Traction Company. And so clearly are they within the limits named, c mpeting lines, that admittedly any attempt to consolidate the Traction Company with either of them would offend against the state if not the federal law. (Record, p. 30.)

This condition must exist as to every lateral line. If it operates to prevent the granting of the relief provided for in the statute, then the law becomes wholly ineffective and the construction destroys the statute. What is meant by the phrase "would offend against *the state* if not the federal law" is not apparent. This can not be the law.

Again, the Commerce Court says:

> It may be that some shippers along the line of the Traction Company's road are not so fully accommodated as they might be, as the case stands; and their needs are to be consulted to a certain extent without doubt. But this is not controlling, and their rights have necessarily to be worked out through the road for which in each instance a switch connection is sought, the character of which as a lateral

branch line is only incidentally affected thereby. (Record, p. 31.)

If the meaning of the last part of this quotation is understood, it must mean that the fact that a community is not adequately served with interstate transportation is not a very material matter in determining whether a road is a lateral road; that this question must be worked out mainly in reference to the larger roads whose local traffic may be slightly affected. This judicial attitude is very different from that taken by the State courts in the cases above cited. There the sole question seemed to be whether or not the communities and shippers were to be served, or better served, by the lateral road. One can not read the Federal act with an open mind without being impressed with the fact that Congress had in view primarily the interests of shippers, the growth of communities, the building up of the trade and commerce of the country. And if this be the purpose of the act, then the Commerce Court evidently erred in its conclusion above quoted.

Upon the authorities and for the reasons above cited, we respectfully submit that the Commerce Court erred in holding that the Traction Company was not a lateral, branch line railroad, within the meaning of section 1 of the act to regulate commerce.

As stated in the beginning of this brief, this is the only question decided by the Commerce Court, and upon which its decree is based. The power of the Commission to make the order in question is conceded, if the Traction Company's line is a lateral, branch

railroad. We therefore do not discuss other questions raised in the court below.

III.

The second order establishing through routes.

Section 15, as amended, among other things provides:

> The commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; * * *. The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character. * * *.
>
> And in establishing such through route the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through

route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

As we have already noted this branch of the case is entirely separate and independent of the complaint asking for switch connections. The two complaints could have been brought in separate proceedings, or they could be, as they were, joined in one complaint. The orders, however, are separate orders under two independent provisions of the statute. It will be observed from a reading of the statute that the question whether the traction line is a lateral road has nothing whatever to do with the establishment of through routes and joint rates. These interstate routes and rates are not dependent upon the physical connection of the lines over which the through routes run. The transfer may be made through elevators, over docks, or by belt railroads, ferry boats, lighters, or drays. The decree of the Commerce Court, therefore, is clearly erroneous in suspending the order for through routes on the ground that the traction line is not, in the judgment of the Commerce Court, a lateral railroad.

Under this branch of the case, as stated by the Commission (Record, p. 12), there are only two conditions, namely, (a) the Commission may not require any railroad involuntarily to embrace in a through route substantially less than the entire length of its road between the termini of the proposed through route, and (b) it may not establish through routes

and joint rates between a steam railroad and a street electric passenger railway that does not transport freight and passengers. Neither of these limitations is violated by the order. The Commission in its report gives the reasons for establishing these through routes at particular stations on the traction line. Certainly the appellees can not object because the order does not establish through routes at every station upon the traction line. Eliminating the stations nearest the junction points was, as stated in the report, to protect the existing business of the main lines, these stations being adequately served by them. We do not discuss this question further, because the Commerce Court did not rest its decision upon this provision in the statute.

The exception made in favor of street electric railroads clearly shows that it was expected and intended that through routes and joint rates would be established between main-line roads and interurban electric roads. For, as Chief Justice Marshall so well reasoned with reference to powers granted to Congress by the Constitution of the United States, "Limitations of a power furnish a strong argument in favor of the existence of that power." *Gibbon* v. *Ogden*, supra. If the act to regulate commerce did not include electric railways doing freight and passenger business, there was no reason for excepting a particular class of electric railways from the power which Congress was then conferring upon the commission.

No. 648.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, CINCINNATI AND COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK AND WESTERN RAILWAY COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, Cincinnati and Columbus Traction Company, and Interstate Commerce Commission, appellants,
v.
BALTIMORE AND OHIO SOUTHWESTERN Railroad Company and the Norfolk and Western Railway Company.

No. ~~1133.~~ 648

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

GENERAL STATEMENT.

The question to be decided in this case is whether the Interstate Commerce Commission erred as a matter of law in deciding that the Cincinnati and Columbus Traction Company is a "lateral branch line of railroad" within the meaning of section 1 of the act to regulate commerce, and therefore entitled to switch connections and through routes with the B. & O. Southwestern Railroad Company and the Norfolk & Western Railway Company.

The Commerce Court has decided that the Commission did so err, and the case comes up on the joint appeal of the United States, the Commission, and the Traction Company.

FACTS.

The appellees, the B. & O. Southwestern Railroad Company and the Norfolk & Western Railway Company, are interstate steam railroads. Between Norwood, Ohio, and Hillsboro, Ohio (where both have stations) they inclose a diamond-shaped territory 50 miles long and, at the widest point, something over 20 miles wide. (See Map, Record at p. 8.) On the long diagonal of this diamond (50 miles) runs the line of the Cincinnati & Columbus Traction Company, an electric, interurban railroad, carrying passengers, freight, and express matter, and serving the territory between the other two lines. The map shows that it crosses the B. & O. Southwestern at Madeira, and the Norfolk & Western at Hillsboro. The statement to the contrary in the body of the petition itself (T. R. 2) must, therefore, be subject to some sort of qualification, possibly that the crossing is not at grade.

Furthermore, at an earlier time, during the construction of the traction line, it did have actual switch connections with both of the other lines; with the Norfolk & Western at Hillsboro, the eastern end of the diamond; and with the B. & O. Southwestern at Madeira, in the west; and also with the B. & O. Southwestern at Hillsboro Junction, 1¼ miles from Hillsboro. (T. R. 11, 30.) Shortly

after the completion of the Traction Company's line in 1905, these switch connections were removed (T. R. 11); but in the year 1908 the Traction Company served upon both appellees a written request for their reestablishment. This was refused. Accordingly, in 1909, the Traction Company commenced formal proceedings before the Interstate Commerce Commission to compel their reestablishment, and also to compel through routes and joint rates applicable thereto.

During the pendency of the proceedings, the Supreme Court of the United States, in the case of *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R. Co.*, (*Rahway* case) (216 U. S., 531), pointed out that, as the statute then stood, it failed to provide for any enforcement of the rights given to the lateral branch lines; that whereas a lateral branch line, as well as a shipper, might request the installation of a track connection, nevertheless proceedings for the *enforcement* of the right could be begun by shippers only. Thereupon two shippers, who resided along the line of the Traction Company and who had previously testified in its behalf, were made co-complainants in the suit. No new evidence was taken thereafter. In the words of the Commission—

> * * * the testimony offered by the defendants seems to cover the entire ground, and in making these objections it is not suggested that any additional testimony is required by the presence on the record of these two

> shippers as co-complainants or that further testimony is in fact available. There was abundant opportunity during the months tnat intervened between the closing of the record and the oral argument to have offered additional testimony," had the railroads desired to do so. (T. R. 11.)

In June, 1910, before either the final argument or the decision in the case, the act to regulate commerce was substantially amended; first, in section 1, by giving the Commission power to compel the installation of switch connections on the application of *lateral branch railroads* as well as on the application of shippers, thus curing the defect in the act noticed in the *Rahway* case; and second, in section 13 and section 15, by giving to the Commission that plenary power to act upon its own initiative which will be discussed hereafter.

In March, 1911, the Commission made a report in said proceeding to the effect that the Traction Company was entitled to the switches and through routes requested but making no formal order. The railroads, however, neglected to conform to the admonition expressed in this report, and in December, 1911, a formal order was entered commanding them to install switch connections at or near the points where they had previously existed.

In so far as the order relates to through routes, it is somewhat complicated. It divides the stations on the line of the Traction Company into three groups. The stations near the termini, where the

diamond narrows at either end, were refused through routes or joint rates on the ground that by means of the two steam railroads they already had adequate through routes to the main arteries of interstate commerce. But the stations in the central group (between and including Boston and Dodsonville) were given through routes because the shippers in that region had no other reasonable outlet, and as a practical matter must either use the lines of the Traction Company or remain bottled up altogether.

No new joint through rates were prescribed, the Commission acquiescing in the suggestion of the Traction Company that the rates applicable to the through routes should be merely the sum of the locals.

To set aside this order the steam railroads sued in the Commerce Court. The respondents filed motions to dismiss, which were overruled upon the ground that switch connections could be given only to "lateral branch lines," and that as a matter of law the Traction Company could not be a lateral branch line in relation to these railroads because as to the points near the termini it was a competitor.

This ground going to the merits, the parties stood upon the motions to dismiss and the Commerce Court entered a final order, from which the respondents below now appeal.

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FIRST POINT.

The Commission did not err in finding that the Traction Company is a lateral branch railroad within the meaning of the act to regulate commerce.

So far, of course, as the character of the Traction Company is dependent upon facts it was exclusively for the Commission to determine (*Crane Iron Works* v. *United States*, Commerce Court, June 7, 1912), but the court below was here of opinion that the Commission had misinterpreted the legal meaning of the words "lateral branch line of railroad." In brief, the court held upon an inspection of the map that because there is a section at the ends of the diamond, where the Traction Company's diagonal finds its termini, in which the main line and the Traction Company serve the same municipalities, and in a limited sense must be competitors, it necessarily follows that the diagonal *can not* be a lateral branch line within the meaning of the statute. It is difficult to perceive just what peculiar features of this geometrical figure make that result inevitable.

It can not be that a line is "a lateral branch line" within the meaning of the statute only in case it approaches the trunk line at right angles—lest, otherwise at some point a shipper might choose to make initial delivery to the lateral instead of the trunk line. In every conceivable case there must inevitably be a certain competitive area near the junction of two lines, whatever the angle of their approach, and even if the approach is at the exact right angle.

But these words, "lateral branch line," are words of art and have long been used in American statutes, and they have never been construed as importing the limitation given them below. Presumably they were used by Congress in their already established meaning, under which the length, direction, or angle of approach, has little to do with the question. In regard to this particular situation, the cases clearly demonstrate that if either of the petitioning roads were attempting to build the line of the Traction Company under a charter provision permitting it to build lateral branch roads the construction could not be enjoined as *ultra vires.*

Newhall v. *Galena, etc., R. R.* (14 Ill., 273, 274).

> Attempt to enjoin, as ultra vires, the building of an offshoot at an acute angle from the main line to connect with another railroad 40 miles away. Held: A lateral road; intra vires.

McAboy's Appeal (107 Pa. St., 548, 557).

> An extension 500 feet long from the terminus of the main line along the same direction was held a branch line. "We can not agree that the definition of such a structure shall depend either upon its length or direction."

Vollmer v. *Schuylkill, etc., Ry. Co.* (115 Pa. St., 166).

> An addition was held to be a branch line, though *double* the length of the original line. The relative importance of the two can not be measured by their length alone.

B. & O. R. R. v. *Waters* (105 Md., 396).

> A mere loop or cut-off—beginning and ending on the main line—held a *lateral* road.

Greenville & Hudson Ry. Co. v. *Grey* (62 N. J. Eq., 768, 770).

> An offshoot which returned again to the main line, held a branch, though only 1¼ miles long, parallel to the main line, and only 225 feet away.

Florida, etc., R. Co. v. *Pensacola, etc., R. Co.* (10 Fla., 145, 165, 169).

> The word "lateral" held to *prohibit* a road connecting with the main line at right angles.

Blanton v. *Richmond, etc., R. R.* (86 Va., 618).

> Where, by charter, power was given a railroad to construct "branch or lateral roads," such power was held to authorize a branch running in the same general direction as the main line, and the fact that it would incidentally connect the main line with another railroad did not prevent it from being a branch road.

This broad interpretation of the words "lateral branch line" not only accords with the statutory significance encrusted upon these words at the time of their adoption by Congress, but it is necessary to the accomplishment of the remedial purposes of the act. These purposes were already stated by this court in the *Rahway case, supra,* where the court said:

> It is plain from the provisions of the act, the history of the amendments, and justice,

> that the object was * * * primarily at least to provide for *shippers seeking an outlet* * * *. (216 U. S., p. 537.)

It seems that the court below did not give due weight to this plain and controlling remedial purpose. Indeed, the opinion seems to state a contrary view, that the necessities of the shippers were not the primary concern of Congress:

> It may be that some shippers along the line of the traction company's road are not so fully accommodated as they might be, as the case stands; and their needs are to be consulted to a certain extent without doubt. But this is not controlling, and their rights have necessarily to be worked out through the road for which in each instance a switch connection is sought, the character of which as a lateral branch line is only incidentally affected thereby. (T. R., p. 31.)

Having regard to the true purpose of Congress as recognized by this court in the case above cited, and also having regard to the old-established meaning of the words, the test whether a given road is a lateral branch road must be this:

Does it as a principal thing serve shippers to whom a track connection is necessary to give them reasonable access to the main arteries of interstate commerce?

This test excludes the existing interstate trunk line, for that is both a main artery itself, and as a practical matter always does connect with other arteries. It excludes also the short line built as a

mere competitor. On the other hand it secures fulfillment of the purpose of Congress to prevent shippers from being bottled up and excluded from interstate commerce.

Under this test the character of the traffic along this diagonal must have an important bearing. It might be almost all through shipments from one terminus to the other, i. e., almost all competitive. On the other hand it might be principally shipments between the intermediate places and the termini, or between the intermediate places and points far out along the main highways of interstate commerce, in which case would it not be proper for the Commission to say that this railroad is *in the main* and in its dominant character, a feeder, a branch, the representative of "shippers seeking an outlet"?

In other words, whether this Traction Company is a lateral branch line, or so much an independent rival and actual competitor that to give it track connections would be to "issue a roving commission" to descend upon the main lines, is a question that can not be predicated merely upon the geometry of the situation.

Assuming that it could be tested so simply, the Commission here was quite as well justified by even the mere geometry in reaching its conclusion as to the dominant quality of this road as was the court below in reaching the opposite conclusion. That sort of judgment is one of the very things in respect to which the Commission is especially trained and expert and intended to be final.

But the whole question is one of degree dependent upon a considerable mixture of factors—geometry, distribution of population, character of industries, habits of traffic, practical demands and necessities for outlet, and so on. Variations in these factors determine whether essentially and truly the line is a feeder or an independent competitor, and the conclusion of the Commission upon that question of fact was not properly to be reversed by the court below merely because it drew contrary inferences from a view of *one* of the factors.

The opinion below also takes the view that the Commission found the Traction Company to be a lateral branch line as to its middle section and not a lateral branch line as to the end pieces, and it considered that this was an error of law because the line must be either one thing or the other and can not be both. (R., p. 30.) This seems to us a misconception of the Commission's position. It did not find that some of the road was lateral branch and the rest of it not lateral branch. It found that the whole thing in its total character was a lateral branch line, though having (as every such line must) an incidental competitive territory. The sole purpose and occasion for its making a distinction between different points on the line was in reference to the requirement of through routes, which is a totally separate matter. Through routes run from point to point and depend upon considerations affecting the particular points. "Lateral branch lines" depend upon the dominant character of the lines themselves as wholes. The

Commission held that this was a lateral branch line *as a line;* and then in considering the rights of its various stations to through routings and joint rates it followed its usual course of refusing such routings to such points as were in competition with the other road and already had the through routings over the line of that other road. This is fully explained in the report of the Commission. (R., p. 12.)

Incidentally the fact that this order would give *two* outlets, one with each trunk line, would not be conclusive of its invalidity. It might well be, within the meaning of the statute, a branch line as to both, as was indeed the case with the lateral branch roads concerned in *Newhall* v. *Galena, etc., R. R., supra,* and *Blanton* v. *Richmond, etc., R. R., supra.* In the *Rahway case* Mr. Justice Holmes, though admitting *obiter* that there is force in the argument that the railroad there in question, a road only 10 miles long, which already had track connections and joint routes with two other main roads, could not be regarded as a lateral branch of a third, carefully limited that doctrine, saying:

> On the other hand it would be going far to lay down the universal proposition that a feeder might not be a lateral branch road of one line at one end and another at another. (216 U. S., p. 537.)

This case falls within the saving qualification. The two main roads here in question, as plainly appears from the description in the first two pages of the petition (Rec. 1, 2), serve two wholly different regions

drawing from this portion of Ohio, the one into Kentucky, Illinois, and Indiana and the other into Kentucky, Virginia, West Virginia, Maryland, North Carolina, and Tennessee. Access to one would not be at all equivalent to access to the other. And so the Commission must have found, or it would not have given connections with both.

And even if not entitled to connections with both lines, it might at least have connections with one.

SECOND POINT.

The order does not lack the technical prerequisites as to proper parties and prior formal request in writing.

The opinion below suggests a further difficulty, namely, that even if the Traction Company is held to be a lateral branch line, nevertheless the Commission had no power to make the order because of an alleged failure to observe certain technicalities in invoking its jurisdiction. The petitioning railroads alleged that they were entitled to, but never received, a formal application in writing. They admitted that the Traction Company did make such an application prior to the proceedings before the Commission. But the contemporaneous decision of the *Rahway* case (216 U. S., 531) pointed out that owing to a defect in the statute only *shippers* could apply to the Commission to compel track connections. Immediately after that decision, however, two shippers who had taken an active part on behalf of the Traction Company in the proceedings before the Commission added their names as co-complainants there, and a little

later still the defect in the act was remedied so that the lateral branch line could apply in its own name. No further request in writing was made, however, either by the Traction Company or by the shippers.

The petitioning railroads say that since the letter of the Traction Company was written at a time when it had no rights, and since no shipper has made any formal written request whatever, they have been summoned before the Commission without the legal warning to which they were entitled.

To that ingenious argument the Commission gave the following valid answer. Even before the amendment of the act, the *duty* to install switch connections arose as well out of application by the railroad as out of application by the shipper. Section 1 of the act read:

> Any common carrier subject to the provisions of this act, *upon application of any lateral, branch line of railroad*, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection, * * *

The difficulty pointed out by the court in the *Railway* case is one affecting the *remedy* only. The provision as to the *remedy* was as follows:

> If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper such shipper may make complaint to the Commission, * * *

The amendment of 1910 changed this provision as to the remedy by inserting after "shipper" in each instance the words "*or owner of such lateral, branch line of railroad,*" omitted in the act as first drawn.

If, then, there was an existing duty even before the amendment, and the amendment, by curing the defect in the remedial section of the statute, provided a means of enforcing that duty, it must have validated *ab initio* the proceedings before the Commission.

The intent of Congress to prevent the recurrence of cases like the *Rahway* case, *supra*, by giving the greatest possible flexibility and freedom to procedure under the act, is demonstrated by the further provision in the amendment of June, 1910—giving the Commission the right of its own motion to institute such an inquiry and to make such an order:

> And the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this act, or concerning which any question may arise under any of the provisions of this act, or *relating to the enforcement of any provisions of this act.* And the said Commission shall have the same power and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, *including the power to make and enforce any order or orders* in the case

> or relating to any matter or thing concerning which the inquiry is had excepting orders for the payment of money (act to regulate commerce, sec. 13—as amended June 18, 1910).

And finally the argument, however ingenious from a technical standpoint, certainly has no equitable basis. In the words of the Commission (T. R., 11):

> The letters of these two shippers, in connection with their testimony and their petition to be made cocomplainants, seem to us not only sufficient for all practical purposes to bring them before us as cocomplainants and to serve as their application in writing for a switch-track connection, but sufficient to give the defendants full notice and to advise the Commission of their interest in the questions at issue. On the other hand, the testimony offered by the defendants seems to cover the entire ground, and in making these objections it is not suggested that any additional testimony is required by the presence on the record of these two shippers as cocomplainants or that further testimony is in fact available. There was also abundant opportunity during the months that intervened between the closing of the record and the oral argument to have offered additional testimony. Under such circumstances, to take a technical view of the state of the record would be inconsistent with our general practice of getting at the substance of things when possible; and, inasmuch as the whole situation is fully disclosed and we are in a position to protect the legal and substantial rights of all the parties in

interest, we think we may fairly find, as we do, that the necessary parties complainant are before us and that all the requirements of the act, in order to give us jurisdiction of the subject-matter, have been observed.

THIRD POINT.

The order is not invalid by reason of its provisions regarding the expense of installing the switch.

It has been settled beyond question that it is not a "taking" of railroad property, but a proper exercise of the power to regulate common carriers, to compel them to install a switch connection with another line, provided the circumstances are such as to insure adequate return upon the investment and are otherwise reasonable. This is true even though compliance with the order requires the expenditure of money and the acquisition of land by eminent domain.

Wis. etc., R. R. v. *Jacobson* (179 U. S., 287, 302);

State v. *Chi., M. & St. P. Ry. Co.* (115 Minn., 51, 53);

State v. *C., B. & Q. R. R.* (85 Kas., 649);

See also—

Minnesota, etc. Ry. v. *Minnesota* (193 U. S., 53);

Or. R. & N. Co. v. *Fairchild* (224 U. S., 510).

The Commission, after considering the evidence, found that the conditions prescribed by the statute existed, saying (T. R., 11, 12):

Coming now to the merits, the first inquiry is whether a switch connection, using the

> language of the act, "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." On this point we think the record leaves no room for doubt. A physical connection with the defendant, the Baltimore & Ohio Southwestern, at one time existed at Madeira and also at a point spoken of in the record as Hillsboro Junction. At the same time there was also a connection with the line of the Norfolk & Western at the latter point. They were put in when the line of the complainant was under construction, and were removed after its completion, apparently in accordance with a previous understanding to that effect. It is not to be doubted that it is reasonably practicable to restore these connections at those points or to put connections in elsewhere, or that when restored or put in elsewhere they can be operated with safety. Nor can it be doubted that there will be sufficient traffic to and from points on the line of the complainant reasonably to compensate the defendants for constructing, maintaining, and operating such switch connections with the complainant.

The act to regulate commerce, section 1, provides that where the Commission issues an order compelling a trunk line to install track connections it shall also "*determine as to * * * reasonable compensation therefor.*" In the present case the Commission directed simply that the trunk line roads

> construct—maintain and operate during a period of not less than two years—a switch

> connection for the transfer of interstate traffic * * * the expense of installing such connection to be borne by said complainant. (T. R. 4.)

The objection that this order is defective in that it does not fix in express figures the sum which the railroads are to receive, and provide security for its payment, proceeds from the wholly mistaken analogy of eminent domain proceedings. This is not eminent domain, but the regulation of a common carrier. While it may well be that in eminent domain the compensation must be provided for in advance, and secured to the owner of the property, that rule has no application here. The Commission could lawfully have thrown the entire expense upon the railroads had it chosen; and if the whole expense, *a fortiori* it could compel it to incur without security the preliminary expenses of construction, the ultimate burden of which would rest upon another. A case almost directly in point is *State* v. *Chi., M. & St. P. Ry. Co.*, 115 Minn., 51. There the State commission directed the installation of track connections with a stone quarry, the railroad to bear the expense of installation provided the quarry owner bore the expense of grading the right of way. The road appealed on the ground that the expense was so inequitably apportioned as to be a taking. The court said (p. 53):

> The mere fact that compliance with the order will impose a pecuniary burden upon the appellant does not necessarily affect its

> validity; for the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character. *It would have been competent for the legislature to have placed upon the railroad companies the entire cost of putting in side or spur tracks ordered in the exercise of the police power.*

So also in *Wis., etc., Ry. Co.* v. *Jacobson* (179 U. S., 287) the Commission, upon the petition of a shipper, compelled the two unwilling railroads to install and operate a switch connection and to bear the entire expense themselves; and this court upheld the Commission.

In the present case the trunk lines have a right to expend a reasonable amount in installing switch connections. If the Traction Company, after the completion of the connections, should refuse to pay, or should contest the items of expense, the proper remedy would be to ask the Commission for a reparation order, which, being given after hearing, would be a proper basis for a suit in court. It is wholly unreasonable to suppose that in every case the Commission must designate in advance the exact number of dollars the trunk line shall expend and the branch lines shall repay.

If the railroads conceive that they are entitled to security, their course is to present their claim in this respect to the Commission, and not having done so, they have no standing to ask the annulment of this order. The point is one of detail which is not essential to the order and was not suggested to the Com-

mission. Incidentally the counsel for the Traction Company offered in open court to provide ample security.

FOURTH POINT.

The order compelling through routes was constitutional and within the Commission's statutory power.

The act to regulate commerce, as amended, provides, section 15:

> The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; * * *

Compulsory through routes have been upheld in the following cases:

Burlington, etc., Ry. v. *Dey* (82 Iowa, 312, 338).

State v. *Minn. & St. L. R. Co.* (86 Minn., 191, 196).

Jacobson v. *Wis., etc., Ry.* (71 Minn., 519).

In *I. C. C.* v. *N. Pac. Ry. Co.* (216 U. S., 538) an order compelling the Northern Pacific to enter through routes with the Union Pacific was set aside. The court based its refusal solely upon the ground that a satisfactory through route already existed, and apparently *assumed the constitutionality* of the order.

The following language from *Minn. & St. L. Rd. Co.* v. *Minnesota* (186 U. S., 257, 263) shows clearly that the Supreme Court regarded such statutes constitutional:

> We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress in passing the interstate-commerce act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several States (*Cincinnati, etc., R. R. Co.* v. *Int. Com. Com.*, 162 U. S., 184), and that, if the power of the State commission were limited to the tariffs of a single road, it would be wholly inefficacious in a large number, if not in a majority, of cases—in fact, that the whole purpose of the act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the State to supervise and regulate them. Such a contract for a joint rate having been in existence when the order of the commission was made, we do not think it was affected by the subsequent withdrawal of the Minneapolis and St. Louis Company. It may also be said in this connection that in *Wisconsin, etc., R. R. Co.* v. *Jacobson* (179 U. S., 287) we held that, under this very act, railways in Minnesota might be compelled to make track connections at the intersections

of other roads for transferring cars from the lines or tracks of one company to those of another, as well as for facilities for the interchange of cars and traffic between their respective lines. The case did not involve the right of the commission to prescribe joint through rates for the transportation of freight between points on their respective lines, but if any inferences are to be derived from the opinion they are in favor of such right. See also *Burlington, Cedar Rapids, etc., Railway* v. *Dey* (82 Iowa, 312, 338).

There is no basis for the suggestion that such an order compels an unwilling railroad to incur the risk of being unable to collect its division of the rate from an insolvent connecting carrier. It can demand prepayment of its charges before accepting the goods if it wishes.

Gamble Robinson Co. v. *Chicago & N. W. R. Co.* (168 Fed., 161; C. C. A., 8th).

So. Ind. Exp. Co. v. *U. S. Exp. Co.* (88 Fed., 659; Aff'd. 92 Fed., 1022; C. C. A., 7th).

Little Rock & M. R. Co. v. *St. Louis S. W. R. Co.* (63 Fed., 775; C. C. A., 8th).

Jacobson v. *Wis., etc., Rd. Co.* (71 Minn., 519, 532).

It is objected further that the order establishing through routes necessarily requires the petitioners to interchange their own cars with the Traction Company without payment for their use or security against destruction, and is therefore void under *Central Stock Yards Co.* v. *L. & N. R. R., 192 U. S., 568; 212 U. S., 132*).

The requirement of "through routes" alone does not require the interchange of petitioners' cars, or anything more than delivery to designated connecting carriers, with or without transshipment, and without further steps on the part of the shipper. Nor does any section of the act to regulate commerce require the petitioners to send their cars beyond their own rails. *Central Stock Yards* v. *L. & N. R. R. Co.* (192 U. S., 568, 571).

Nor does any other language in the Commission's order require such interchange. The objection is really based upon a misconception of the following paragraph of the order:

> And it is further ordered that defendants, The Baltimore & Ohio Southwestern Railroad Company and Norfolk & Western Railway Company, according as their various lines may run, be, and they are hereby, notified and required to establish and put in force, on or before the 15th day of February, 1912, and for a period of at least two years thereafter to maintain, through routes to and from interstate points to and from all points on the complainant's line between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of cars under through billing and through charges based upon the rates of the respective carriers herein to and from the junction points established by this order, the complainant carrier having filed its local rates with this Commission as applicable to interstate movements over such through routes.

The words "in order that shippers at and between those points may have access to and from interstate points by interchange of cars under through billing" do not require the petitioners to send *their own* cars over the lines of the Traction Company. The passage quoted does suggest a reason for the installation of the connection, and once a connection is established the statute would automatically compel the petitioners to receive and haul any loaded cars the Traction Company might offer, if at least they are such as might properly and safely travel over petitioners' lines. It would also compel the petitioners to receive cars tendered by *other* companies to be hauled and delivered to the Traction Company. Such would be merely instances of the tender of goods in appropriate packages and could not be refused. As was said in *Burlington, etc., R. Co.* v. *Dey* (82 Iowa, 312, 328):

> A railroad company, as a common carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded impose upon it the obligation to haul cars of other companies brought to it for transportation over its own road.
>
> Accord; *Rae* v. *Grand Trunk R. Co.* (14 Fed., 401).
>
> *Mackin* v. *B. & A. R. Co.* (135 Mass., 201, 206).
>
> *Peoria, etc., Ry.* v. *Ch., R. I. & P. R. Co.* (109 Ill., 35).
>
> *Hudson Valley Ry.* v. *B. & M. R. Co.* (106 App. D., 375, N. Y.).

Mich. Cent. R. Co. v. *Smithson* (45 Mich., 212).

Numerous cases collected in *Wyman, Public Service Companies* (sections 529, 530).

See also—

Mo. Pac. R. R. v. *Larrabie Mills* (211 U. S., 612).

Penn. Ref. Co. v. *West N. Y. & P. R. Co.* (208 U. S., 208, 222).

Central Stock Yards v. *L. & N. Ry.* (192 U. S., 568, 572.)

This, with the opportunity to transship with maximum facility, furnishes a sufficient reason for installing switch connections. Switch connections were ordered in *Wis., etc., Ry.* v. *Jacobson* (179 U. S., 287, 291), even though interchange of cars could not be compelled.

Of course none of the objections discussed in this point go to the validity of the whole order, but at most, if valid, would require only its modification.

FIFTH POINT.

The Carmack amendment is immaterial.

It was urged below that the order is invalid because it would subject the railroads involuntarily to liability under the Carmack amendment for occurrences on the Traction Company's line, and that this would be unconstitutional.

Obviously, the point is not well taken.

If the Carmack amendment is constitutional, its application can not invalidate this order. If it is not constitutional when applied to compulsory through routes, it can not create the liability objected to. The time to raise the objection is not here, but when petitioners are sued by shippers for such occurrences.

SIXTH POINT.

The order is not void because as to the physical condition of the Traction Company's line, the Commission supplemented the testimony of witnesses by independent investigations.

The petition (T. R., 8) draws attention to the following passage from the report of the Commission (T. R., 15):

> We think that much of this criticism as to the physical condition of the line of the complainant is the reflection of a special view in which the requirements of steam lines with respect to their roadbed and bridges were taken as a basis of comparison. Giving due weight to the testimony of witnesses on each side of the controversy, but basing our conclusions more largely upon our own investigations, we think the complainant will have no difficulty in moving regular line equipment over its road.

Upon the strength of this passage, and this alone, petitioners aver that grave irregularities existed in the proceedings before the Commission, so grave as to render void *per se* any order resulting therefrom. These grave irregularities consisted in sending one of the Commission's examiners to make a personal

inspection of the physical condition of the Traction Company's line, and to report thereon to the Commission. This was in accordance with the Commission's practice in similar cases. Both the petitioners and Traction Company knew that this point was being investigated, and had every opportunity to put before the Commission any and all evidence they had to offer. (R., p. 15.) There was no denial of full hearing. It is the independent investigation petitioners object to.

In *Cederberg* v. *Robison* (100 Cal., 93) appears the following passage, quoted by *Sutherland on Damages*, section 441, note 1:

> Juries are permitted in many cases to exercise their individual judgments as to values upon subjects presumptively within their own knowledge, which they have acquired through experience or observation, *and the objection that no evidence was presented before them upon such subjects is insufficient to defeat their verdicts.*

Even assuming that legal analogies are controlling, why may not the Commission, which is the trier of facts in these cases, also rely upon its own expert knowledge? If it could not do so, much of the advantage to be gained from its long experience would be lost.

When the jury is the trier of facts it may "view" the subject matter in controversy. *Wigmore on Evidence*, sections 1150–1168. Of course the Commission may do the same. And if it may do so

in person, it may do so through one of the expert agents which it is permitted to employ under section 20 of the act. Indeed, in *People* v. *D. & H. Canal Company* (165 N. Y., 362, 365), a statute requiring a "*careful personal examination*" by the State railroad commission prior to the compulsory erection of new freight stations was held satisfied by an investigation through a special examiner.

However, we submit that judicial analogies ought not to be too much relied upon. They have been the basis of over-technical objections in too many of the cases involving appeals from orders of the Commission. We submit that these persistent efforts to confine it to the strict rules of judicial procedure are fraught with the gravest danger to the efficiency of the Commission itself—in the elasticity of its procedure lies the very secret of its usefulness as an administrative body. The Commission is not a court, was not intended to be a court, and ought not to be made a court. The words of Mr. Justice Day in *I. C. C.* v. *Baird* (194 U. S., 25), though uttered in regard to the relevancy of evidence are equally applicable here.

> The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common

> law where a strict correspondence is required between allegation and proof (44).
>
> To unreasonably hamper the Commission by narrowing its field of inquiry beyond the requirements of the due protection of the rights of citizens will be to seriously impair its usefulness, and prevent a realization of the salutary purposes for which it was established by Congress (47).

The act to regulate commerce leaves no doubt as to the intent of Congress to allow the Commission a nonjudicial freedom. It provides (sec. 17)—

> That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

The Commission itself has so interpreted its powers from the very first. Thus in *Boston Fruit & Produce Exchange* v. *N. Y., etc., R. Co.* (4 I. C. C., 664, 678) the Commission based its decision upon contracts and tariffs which were in its files, but which had not been offered in evidence. *Daish on Procedure before the Interstate Commerce Commission* collects numerous other instances where the judicial rules of evidence have been dispensed with; for example, hearsay (Daish, sec. 137), ex parte affidavits (sec. 144); no principle of estoppel (sec. 136); allowance of secondary evidence (sec. 132).

In *Mo. & Kans. Shippers Ass'n.* v. *M., K. & T. Ry. Co.* (12 I. C. C., 483, 484) the Commission said:

> While its procedure is to some extent judicial in nature, the Commission is essentially

> an administrative body; and in the adjustment of contentious proceedings of this kind, it ought to examine into the real substance of the matter, unembarrassed by considerations that are purely technical.

And in the report in the instant case it said (T. R., 10):

> In the general public interest the Commission has endeavored to simplify its practice and procedure and to perform its functions in a practical way, without permitting merely technical matters to interfere unduly with substantial results.

The petitioners knew that the physical condition of the traction line was being investigated. They put in all the evidence upon the subject that they had to offer. And in a hearing before an administrative tribunal, we submit that that is all they were entitled to. Such has been the holding of this court in regard to other administrative tribunals. The right to confront and cross-examine witnesses and to hear all the evidence adduced has been repeatedly denied.

Origet v. *Hedden* (155 U. S., 228, 237).

The complaint averred a denial of due hearing before the Board of General Appraisers. The court said (p. 237):

> As already stated, plaintiff in the case at bar was invited by the appraisers to present his views in regard to the reappraisement and to suggest questions to be put to the witnesses.

> He did not avail himself of the opportunity, *but insisted on the right to remain throughout the proceedings, to be informed as to all the evidence, and to cross-examine the witnesses as in open court.* This, according to *Aufmordt* v. *Hedden* (137 U. S., 310, 323) and *Passavant* v. *U. S.* (148 U. S., 214), *could not be conceded.* In those cases it was ruled that under the revenue system of the United States the question of the dutiable value of imported articles *is not to be tried before the appraisers as if it were an issue in a suit in a judicial proceeding;* that such is not the intention of the statutes; that the practice has been to the contrary from the earliest history of the Government, and that the provisions of the statute in this regard are open to no constitutional objection.

Tang Tun v. *Edsell* (223 U. S., 673, 677).

An immigration inspector when forwarding to the Secretary of Commerce and Labor the record of the hearing from which an excluded Chinaman has appealed may properly insert therein the results of his own independent investigations upon subjects which the appellant knew were in issue and upon which his witnesses testified.

Oceanic Steam Navigation Co. v. *Stranahan* (214 U. S., 320, 342).

There is no denial of due process when the Secretary of Commerce and Labor, acting upon the report of a medical inspector, exacts a penalty for bringing

into this country persons afflicted with loathsome diseases. The court said:

> * * * it is evident that the statute unambiguously excludes the conception that the steamship company was entitled to be heard, in the sense of raising an issue and tendering evidence * * *.

Murray's Lessee v. *Hoboken Land Co.* (18 How., 272).

The report of a Government auditor was held conclusive upon the existence of a defalcation by a public officer, and distress warrants were properly issued thereon for the seizure of his property.

It would hardly be contended that when the Secretary of War, in a proceeding under Thirtieth Statutes at Large (p. 1154), decides whether a given bridge unreasonably obstructs interstate commerce, he could not consider information furnished him by his engineer officers upon the subjects discussed at the public hearing. See *Union Bridge Co.* v. *U. S.* (204 U. S., 364) and *Monongahela Bridge Co.* v. *U. S.* (216 U. S., 177, 194). Surely the Postmaster General may receive the evidence of his inspectors when he issues a fraud order (See *Public Clearing House* v. *Coyne*, 194 U. S., 497), and the Secretary of the Interior must also be permitted to rely upon his agents when he determines who is an Indian of a particular land-owning tribe (see *West* v. *Hitchcock*, 205 U. S., 80). As was said by Justice Miller in *Davidson* v. *New Orleans* (96 U. S., 97), due

process of law requires "such proceeding in regard to the property as is appropriate in the nature of the case," and nothing more.

CONCLUSION.

The judgment should be reversed and the case remanded with instructions to dismiss the petition.

WINFRED T. DENISON,
Assistant Attorney General.
THURLOW M. GORDON,
Special Assistant to the Attorney General.

SEPTEMBER, 1912.

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No. 648.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, CINCINNATI & COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

CHARLES W. NEEDHAM,
Assistant Solicitor for Interstate Commerce Commission.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912

INDEX.

CASES CITED.

STATUTES.

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BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY and the NORFOLK & WESTERN RAILWAY COMPANY.
} No. 648.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

This case involves a decision of the Interstate Commerce Commission holding that the Cincinnati & Columbus Traction Company, one of the appellants herein, is, as to the appellees herein, a "lateral" railroad, within the provision of section 1 of the act to regulate commerce.

STATEMENT OF THE CASE.

This is an appeal from the final decree of the United States Commerce Court in a suit brought by the appellees, petitioners in said Commerce Court, to

prevent the enforcement of two orders made by this appellant, hereinafter called the Commission, requiring the appellees (1) to establish, and maintain for two years, switch connections with the Cincinnati & Columbus Traction Company for the transfer of interstate traffic, and (2) to establish, and for two years maintain, through routes to and from interstate points to and from all stations between and including Boston and Dodsonville, on the line of the Traction Company. The orders were entered on the 13th day of December, 1911, in one decree, and are set forth in full on page 4 of the printed transcript of record herein. The report of the Commission, upon which the order was entered, is to be found upon pages 8 to 16, inclusive, of the transcript of record herein. The first order—requiring switch connections—was made under the provisions of section 1 of the act to regulate commerce, as amended June 18, 1910. The second order—requiring through routes to certain stations—was made under the provisions of section 15 of said act, as amended.

The proceedings before the Commission were instituted upon a complaint by the Cincinnati & Columbus Traction Company, a corporation, organized under the laws of the State of Ohio as an electric railway for the transportation of passengers and freight, as a common carrier, between Columbus and Cincinnati in said state. Its railroad as now constructed and operated extends from Norwood, a suburb of Cincinnati, to Hillsboro, Ohio, a distance of about 53 miles; its line is wholly within the State of Ohio and belongs

to the class commonly referred to as "interurban" electric roads; its complaint before the Commission was filed on January 21, 1909. The complaint, and the evidence taken by the Commission, showed that prior to the filing of the complaint on November 12, 1908, the Traction Company served a written notice on each of the appellees herein demanding that they establish, or permit to be established, switch connections and through routes and joint rates for the interchange of interstate traffic. (Record, pp. 10, 11.) This request being refused, the complaint was filed before the Commission as stated, and the appellees, upon due notice, appeared and contested the right of the Traction Company to have the relief prayed for.

During the pendency of the proceeding before the Commission this honorable court rendered its opinion in *Interstate Commerce Commission* v. *D., L. & W. R. R. Co.* (216 U. S., 531), holding that the Commission could only grant switch connections with lateral roads, under the act as then existing, upon the complaint of shippers. While the proceedings before the Commission were pending and undetermined, certain shippers on the line of the Traction Company addressed letters to the Commission, and gave evidence upon the hearing which, it was held by the Commission, had the effect of joining them in the complaint. (Record, pp. 10, 11.)

Subsequent to the decision by this honorable court cited above, and prior to the determination of the case by the Commission, Congress, by act approved June 18, 1910, amended section 1 of the act, and

provided that the Commission should have power to order a switch connection "upon application of *any lateral, branch line of railroad or* of any shipper tendering interstate traffic for transportation," etc.

After the amendment of the act, the case before the Commission was reopened, and set down for rehearing and argument. (Record, p. 3.)

The case was finally determined by the Commission upon the complaint of the Traction Company, joined in by certain shippers, and under the act as amended. (Report of the Commission, record, pp. 10, 11.) Subsequent to the report the Traction Company filed with the Commission its schedule of local rates to be applied to interstate traffic. (Com.'s Rept., record, p. 16, and petition, record, p. 2.)

The appellee, the Baltimore & Ohio Southwestern Railroad Company, is a consolidated corporation, organized under the laws of Ohio and Indiana, and operating a line of railway extending across said states, the State of Illinois and into the State of Kentucky (petition, record, p. 1). Its line passes through Hillsboro, Norwood and Cincinnati, in the State of Ohio, and it is a carrier of interstate commerce. Between the city of Cincinnati and Hillsboro the line of this appellee makes a detour to the north into Warren and Clinton Counties, returning southerly to Hillsboro in Highland County. (See map, record, p. 8.) The appellee, the Norfolk & Western Railway Company, is a corporation organized under the laws of Virginia, operating an interstate railroad through parts of Ohio, West Virginia,

Kentucky, Virginia, Maryland, North Carolina and Tennessee. It also passes through Cincinnati and Hillsboro, making a detour to the south in the counties of Claremont and Brown, to Sardinia, thence northerly to Hillsboro. (Map, record, p. 8.) This left a large territory, about 15 miles across at its widest section, without railroad facilities. In this territory were villages whose inhabitants could only reach the railroads of appellees by a wagon haul varying from 5 to 10 miles over country roads. The Traction Company line pursues generally a middle and more direct course from Norwood to Hillsboro, and supplies this territory with railroad facilities. (Map, p. 8.) In addition to its local business the Traction Company transports interstate freight and passengers from this territory, but without the benefits of switch connections or through routes and through rates, transferring its traffic either at Norwood or Hillsboro by independent transfers, at the expense of the shippers, to the railroads of the appellees. To facilitate this interstate traffic the Traction Company and shippers asked to have (1) switch connections at Norwood and at Hillsboro upon which to make transfers without expense to shippers; and (2) through routes and joint rates to facilitate the interstate business.

After a full hearing at which the appellees and each of them appeared and submitted evidence, briefs and arguments, and after a physical examination of the several roads and their connections by the Commission, the Commission filed its report in writing, stating

its findings and conclusions, upon each branch of the case, as required by the act, and entered the orders in controversy. The orders required the appellees to establish the switch connections, and the through routes, on or before the 15th day of February, 1912, and to maintain them for two years thereafter. The appellees filed their petition in the United States Commerce Court on January 22, 1912, and a preliminary injunction staying both orders of the Commission was issued.

The United States filed a motion to dismiss the petition. (Record, pp. 20, 21.) The Commission intervened and filed an answer to the petition. As the Commerce Court in its opinion determined the case upon the sole ground that the traction line was not a lateral railroad the answer of the Commission was afterwards, on February 17, 1912, withdrawn by leave of the court, and the Commission joined in, and adopted the motion of the United States to dismiss the petition. The Traction Company also appeared as an intervening respondent, and joined in the motion of the United States to dismiss the petition.

The respondents elected to stand by the motion to dismiss. The Commerce Court rendered its opinion on April 9, 1912 (record, pp. 25 to 31), and on the 19th day of April entered a final decree overruling the motion to dismiss for the reasons stated in the opinion of the court, and perpetually enjoined the enforcement of both the orders in question, treating them as one order. From this decree an appeal was taken to this court.

ERRORS ASSIGNED.

Several questions were raised in the Commerce Court which that court did not determine for the reasons stated in the opinion as follows:

> These are serious objections which would have to be carefully considered except for the conclusion which we have reached on the underlying question, viz, whether the Traction Company's road is a "lateral, branch line of railroad" within the meaning of the statute, which, if found against that company, is conclusive. (Record, p. 28.)

And, treating the two orders as dependent upon the question decided, the court further said:

> Without undertaking, therefore, to further define a "lateral, branch line of railroad" we are clearly of opinion that the road of this Traction Company does not come within any reasonable meaning of the language used in the statute to describe the class of roads entitled to a switch connection. And if we are right in this view, the Commission was without jurisdiction to make the order in question.
>
> "A preliminary injunction was therefore properly ordered and the motion to dismiss will be overruled." (Record, p. 31.)

This being the only issue upon which the opinion and decree of the Commerce Court was based and from which an appeal was taken, the assignment of errors, several in number (record, pp. 34 to 36), may be stated under two general propositions:

(1) The court erred in holding that the Cincinnati & Columbus Traction Company is not a lateral,

branch line of railroad, as to the lines of the appellees, within the meaning of section 1 of the act.

(2) The court erred in holding that the Commission did not have power to enter the orders in question:

(*a*) Requiring the switch connections, and

(*b*) Establishing through routes to part of the stations on the Traction Company's line.

BRIEF AND ARGUMENT.

I.

The purpose of the act and its application to the Traction Company.

The Traction Company is a common carrier engaged in the transportation of interstate commerce, its line extending from Norwood to Hillsboro, about 53 miles in the state of Ohio; it serves a territory and shippers who are making shipments to points in other states, and receiving shipments from points in other states. These shipments to and from this territory pass over the Traction Company's line to appellees' lines, and there, either at Norwood or at Hillsboro, are transferred by hand or truck, and proceed on their interstate journey. The expense of the transfers is either in the local freight rate or is a special charge paid by the shippers. Delay is occasioned by these primitive methods of transferring interstate freight, which works to the disadvantage of the shippers. To remedy these defects in interstate transportation facilities the Traction Company and the shippers requested that switch connections be made at each end of the traction line and that

through routes be established. The advantages to the shippers in having the switch connections are, (1) that transfers of less than carload lots can be made directly through the freight station by switching cars containing the shipments to the connecting carrier, without unreasonable delay, and without expense to the shipper; and (2) in case of carload lots, the transfer can be made by switching the car to the connecting line and its movement continued to point of destination. To secure the full benefit of these advantages, through billing over a through route is desirable. Where freight is billed through by a common carrier over connecting lines, all transfers, both as to less than carload lots and carload lots, are made by the carriers, unnecessary delays are prevented, and the territory served is put upon a reasonable equality with other producing and consuming territories.

The purpose of the act.—It is one of the purposes of the act to regulate commerce, as amended, to extend interstate facilities to every producing or consuming territory having "sufficient business to justify the construction and maintenance of" switching connections. No other purpose can be suggested for the provision in Section 1, as amended, providing that these connecting facilities shall be granted by the great trunk lines to the small lateral branch lines of railroad serving the smaller communities. To the big line of railroad these smaller streams are important, draining into its channel the traffic from a larger territory than is adequately served by its main line. When these lateral roads, however, are

of the electric type, a type just coming into extended use and competition with the steam roads, decided opposition is presented by the steam roads against the doing of anything that will put the electric roads upon an equality with the steam roads. This opposition has been pressed upon and met by the Commission in many ways. The Commission, however, has taken the view, obtained from the clear reading of the statute, that Congress recognized and intended to recognize the development of electric roads, especially for short lines into new territory; and while the statute provides that through routes and joint rates may not be established between steam railroads and a street electric passenger railway, it is clear that these interurban roads, carrying both freight and passengers, differing mainly from the steam roads in the motive power used, are now to be treated as a part of the great transportation system of the country. They are especially adapted, because of less expense in construction and operation, to serve the smaller rural communities not properly or adequately served by steam roads. But this service to the rural community will not be complete unless interstate shipments can be made over these lines in connection with the trunk lines carrying the great volume of interstate traffic.

The Traction Company in this case serves a community not large, but having a sufficient traffic to warrant the switch connection. Communities are not overlooked by the state because they are small. The only question involved, under the statute, upon

this point is whether there will be sufficient traffic to warrant the expenditure occasioned by a switch connection. This is a question of fact about which due investigation was made by the Commission, and its finding upon this fact is clear and conclusive. (Record, at the bottom of p. 11 and top of p. 12; *I. C. C.* v. *D., L. & W. R. R. Co.*, 220 U. S., 235.)

II.

Definition of lateral railroads.

The terms "lateral railroad" and "branch railroads" or "lateral branch railroads", occur frequently in special charters and general incorporation acts. In fact, until the incorporation of this phrase into the act to regulate commerce by Congress, it occurs in judicial opinions only in connection with condemnation cases, and the inquiry in these cases has been to ascertain whether the railroad company had the power under its charter, or a general act of incorporation, to build a lateral or branch railroad of a given kind or character. In all these cases the connection was made with the main line.

> It is true, as claimed by appellant, that whether a particular portion of a railway is a branch railroad or not does not depend upon its length or direction; but it must be connected with a main line, or constructed, in order to be such. (*Calling* v. *Griffin*, 56 Pa. State, 305; *1 Wood Railway Law*, section 189; *Biles* v. *Tacoma O. & G. H. R. R. Co.*, Supreme Court of Washington, Jan. 3, 1893, 32 Pacific Reporter, 211.)

And that:

> A lateral road is another name for a branch road; and a lateral or branch road is one which proceeds from some point on the main trunk between its termini, and is an appendage to and properly a part of the main road. *Newhall* v. *G. C. U. R. R. Co.*, 14 Ill., 273; *C. & E. I. R. R. Co.* v. *Wiltse*, 116 Ill., 449; *L. S. & M. S. Ry. Co.* v. *B. & O. & C. R. R. Co.*, 149 Ill., 272.

These cases differ from those arising under the act to regulate commerce in this, that the lateral lines referred to in the state cases were already connected with the main line and in that respect were "branches," while cases arising under the act to regulate commerce involve an order directing that a connection be made; after the connection is made they are in a sense branches or connecting lines. In all cases, however, the question of what constitutes a "lateral" road is the same.

The following cases are instructive in so far as they define the word "lateral" and show the disposition of the courts to give in each case force and effect to the spirit and purpose of the law.

The Supreme Court of Pennsylvania had before it a case involving the exercise of the power of eminent domain to construct an extension from the terminus of the Pittsburgh-Thomasville Railroad. The company was authorized "to survey, locate and construct one or more branches of railroad, extending from any point or points in any county through or in

which said main line passes, or in any adjoining county, with a view to the development of the territory within said limits, and furnishing an outlet for its production." The court said:

> Is the proposed extension a branch within the meaning of the act? We think it is. We can not agree that the definition of such a structure shall depend either upon its length or direction * * * The mistake is found in giving too narrow a definition to the word "branch." * * * The branching power given by the 9th section of the act of 1868 is sufficiently broad and comprehensive to authorize the construction of the road in question as a branch and there is no valid reason why it may not be constructed from the terminus as well as from any other point of the main line of the road.
>
> *McAboy* v. *Pittsburgh, etc., R. R. Co.*, 107 Pa. St., 558; American and English Ry. Cases, Vol. 20, p. 314.

In another case in the Supreme Court of Pennsylvania construing a statute which provided that, "Any company incorporated under this act shall have authority to construct such branches from its main line as it may deem necessary to increase its business, and accommodate the trade and travel of the public." Held:

> The main line, although less than four miles long, connects the Baltimore & Ohio and the Philadelphia & Reading systems, and thus becomes an important piece of road, over

> which a large amount of traffic must necessarily pass. * * *
>
> It is not necessary that we should discuss the difference between a branch and an extension. * * * We are clear that this is a branch, and that its character as such is in no sense affected by the incident that, to reach its objective point, it makes a detour that increases its length over that of the main line.
>
> Vollmer's appeal, 115 Pa. St., 166; 8 At. Rep., 223.

A case in the Supreme Court of West Virginia, brought to condemn a right-of-way to construct a branch or branches, was considered. The statute of West Virginia provided: "Any railroad company organized under this chapter may build and construct lateral and branch roads or tramways."

The proposed branch connected with another branch of the main line. The court said:

> Nothing is clearer under our statute than that the railway company may legally construct a branch of a branch, or, that two branches may have a common stem leading into the main line, provided neither exceed fifty miles in length from such main line.
>
> *Wheeling Bridge & T. Co.* v. *Camden C. Oil Co.*, 35 W. Va., 205; 13 S. E. Rep., 369.

The statute of New Jersey provided: "That whenever the railroads of any railroad corporations * * * intersect of cross each other, or shall approach each other within a distance of one mile, * * * it shall be lawful for either corporation to determine

upon constructing a branch railroad or railroads so as to effect such connection."

The Court of Errors and Appeals of New Jersey said:

> It is no objection to the legality of the proposed branch railroad that it will leave the main line on one side of the connection and return to it on the other. * * * The authority is to construct "a branch railroad or railroads so as to effect such connection" and a connecting loop is within the authority.
>
> *Attorney General* v. *Greenville & H. Ry. Co.*, 62 N. J. Eq., 768; 48 At. Rep., 568.

The Court of Appeals of Maryland considering a clause in the charter of the Baltimore & Ohio Railroad Company which authorized "lateral railroads, in any direction whatsoever, in connection with said railroad from the City of Baltimore to the Ohio River," said:

> The learned judge of the Circuit Court reached the conclusion that the proposed road was not a lateral railroad * * * and stated "any branch, therefore, from the main line that is not a feeder of the port of Baltimore is not a lateral railroad as contemplated in the charter. * * * I do not believe from the evidence that the proposed branch will be a feeder of the main line between Baltimore and the Ohio River."
>
> The testimony taken in this case shows that the proposed road will run through a territory without east and west railroad facilities, and that it will cross and connect with the Western

Maryland and Northern Central and the Maryland and Pennsylvania railroads, thereby interchanging traffic with all these roads, both giving and receiving it, and directly tending to develope the trade and transportation of the region it traverses. Yet, upon the theory adopted below, these connections can not be made under the charter. But that this was not the policy of the State in granting this charter appears to us to be conclusively shown by section 23 * * *.

But we have yet to inquire what is the true meaning of the term "lateral railroad". In most of them [charters] the same general power is given to construct lateral roads and in many the language used is very nearly the same. * * * In *Newhall* v. *Galena & Chicago Union R. R. Co.*, 14 Ill., 273, the court said: "A lateral road is one proceeding from some point on the main trunk between its termini. This is a road lateral to and proceeding from the main road. This is a simple fact. Ingenuity can not remove or disprove it."

B. & O. v. *Waters*, 105 Md., 39; 66 At. Rep., 685.

In the Supreme Court of Virginia a question arose as to the right to condemn land to connect the main line of the Richmond, F. & P. R. R. Co. with the Richmond & Petersburg Railroad Co., under a provision of the company's charter which provided, that the company "may make or cause to be made, branches or lateral railroads, in any direction whatsoever, in connection with the said railroad, not exceeding ten miles each in length."

The court said:

> What is a lateral or branch road? The word "lateral," according to Webster means "proceeding from the side; as, the lateral branches of a tree; lateral shoots;" and this I take it is the sense in which this word is to be understood when we speak of branch or lateral railroads. A lateral railroad is nothing more nor less than an offshoot from the main line or stem. * * *
>
> It seems to us, however, perfectly clear that we should hold in accordance with the unbroken current of decisions, as well as upon principle, that the mere fact that the contemplated road runs in the same general direction with the main track will not deprive it of the character of a branch or lateral road.
>
> * * * Upon what principle, then, can we hold that because of the mere circumstance that this branch road connects those two railroads that it ceases to be a branch or lateral road and is not authorized by the charter? We know of none. It may be that this right to make of a branch road a connecting link between two railroads may have been one of the unforeseen results of the grant of power, but as it does not change the terminus, serves as a feeder to the main stem, assists the company to develop the country through which it passes, and tends to promote the public convenience, both as to trade and travel, it can not be regarded as obnoxious to any of the objections that have been urged against it.
>
> *Blanton* v. *Richmond*, F. & P. R. R. Co., 86 Va., 618; 10 S. E. Rep., 925.

This court in a case involving the validity of certain bonds issued to aid in the construction of a branch road said:

> It [the railroad] was expressly authorized "To extend *branch* railroads into and through *any* counties that the directors may deem advisable." For the purpose of aiding in the construction by that company of a road from the junction of the main line with the Pacific Railroad, extending in a northeasterly direction to Booneville, through the county of Howard, the county court of that county, in its behalf and after a favorable vote by the people, made a subscription to the capital stock of the company and issued county bonds therefor. * * *
>
> The subscription was made and bonds issued, in pursuance of a provision in the company's charter which made it "lawful for the county court of any county in which any part of the railroad or *branches* may be, or any county adjacent thereto, to subscribe to the stock of said company * * * and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay the same and to take proper steps to protect the interest and credit of the county court;" * * * The railroad was constructed through Howard County as proposed and has been in operation ever since. * * *
>
> And now it is contended in behalf of the county, and no other question is presented for determination, that there was no legal authority for this subscription or issue of bonds.

> The argument in its behalf is that the main road of the company was established on a line south of the Pacific Railroad; that Howard County could not, by subscription, aid in the construction of the main line; and could not, by subscription, aid in the construction of a road from the junction of the main line northeasterly through that county, because such a road would not be a *branch* road but only an unauthorized *extension* of the *main* line.
>
> We are of opinion that the road constructed through Howard County was, within the meaning of the statute, a branch of the original or main line.
>
> *Howard County* v. *Bank*, 108 U. S., 314.

Observe how in each case above cited, the court rendering the decision lays emphasis upon the fact that the lateral road may connect at any point with the main line and becomes a lateral road by reason of its being (*a*) a feeder to the main line, and (*b*) that it tends to develop the trade and transportation of the region it traverses. In the Maryland case emphasis is laid upon the fact that it connects with other railroads and so furnishes to the territory which it traverses railroad connections, thereby promoting the public convenience both as to trade and travel.

The provisions of section 1 of the act to regulate commerce are clear and explicit:

> Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any

shipper tendering interstate traffic for transportation, *shall* construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, or where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; * * *

If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section 13 of this act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money. (Concluding paragraph section 1, as amended.)

The clear purpose, and object in view, in this statute was the same as in the statutes construed in the cases above cited, namely, to develop trade and

commerce and accomodate the shippers in communities and territories not otherwise provided, or not adequately provided, with railroad facilities. No other purpose can be conceived for this legislation. This purpose then should dominate the construction to be given to the word "lateral" as used in the act.

In discussing the second ground of complaint, the commission, in its report, said:

> None of these towns is within less than approximately five miles, and two or three are ten miles or more by the country roads from any station on the defendant lines. To say that such places are already reasonably well served by either of the defendants is to announce the definite proposition that a wagon haul of from five to ten miles is not an improper burden to put upon an interstate shipper. But in such a view we are not ready to concur as a fixed rule, even when the country roads are so good as the roads in this territory are said to be. While we have little sympathy with, and will not ordinarily lend our aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates, we shall not permit the theory as to what traffic is tributary to a road to be pushed to such an extreme as to impose an undue burden upon shippers. Confining our ruling to the special facts of the case and to the points last mentioned, we think the prayer for through routes should be granted.

This description of the communities in the territory traversed by the Traction Company, when read in the light of the facts in the cases above cited, shows satisfactorily that the Traction Company's line is performing important service for shippers in a territory not otherwise adequately provided with railroad facilities.

That these towns are small and that the Traction Company's line is a minor road, does not impress the case. The words of Mr. Justice Johnson in Gibbon *v.* Ogden (9 Wheaton 1, 196) are appropriate. He said:

> The great and paramount purpose [of the Constitution] was to unite this mass of wealth and power for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means.

While the main purposes of the act to regulate commerce, as stated by this court in several opinions, is to prevent discrimination and favoritism between shippers and localities and to secure reasonable interstate rates, it is also the purpose of the act to extend interstate commerce to every community, by uniting and using all existing instrumentalities, and by raising all agencies to the highest efficiency.

This provision in section 1 of the act refers to minor or smaller lines of railroad; it has no reference to junctions between the great trunk lines. It is intended to secure, as the words clearly indicate, a current of commercial and industrial life to out-

lying communities which are served by these short and less important lines. The underlying question really is whether or not a community is already served by interstate commerce, or whether they are adequately served.

It is a mistake to regard these minor lines simply as small feeders to the main line as though they were created for the benefit of the larger railroad. The act to regulate commerce, while not antagonistic to railroads, and properly construed means their development and growth, is primarily for the purpose of building up the population and wealth of every community within the State. The main lines of transportation are the great arteries of commercial and industrial life, and send this life out through the "branches" to smaller communities. The word "lateral" therefore, as used in this statute, does not depend upon particular direction, or point of contact, or non-competition; but it does mean, properly defined and construed, a line which reaches a territory not adequately served by the main arteries. The time was in the history of the country when a wagon haul over country roads of five or ten miles to a railroad was not regarded as so very disadvantageous, but we have reached the point in competition and extension of trade when it is essential to the development of every community that it should have at its door the best possible means of interstate transportation; and it is to secure this that the statute seeks, in all proper cases, to compel the great lines of railroad to make connection with these lateral lines in

order that every part of the State may be served in the most advantageous manner by these great instrumentalities of interstate commerce.

This honorable Court in the case referred to, Interstate Commerce Commission *v.* D. L. & W. R. R. Co., (216 U. S., 521, 537) while not deciding the point in issue in this case, certainly recognized in the language used, the thought here expressed. Mr. Justice Holmes, speaking for the Court, said:

> There certainly is force in the contention that the words of the statute mean a railroad naturally tributary to the line of the common carrier ordered to make the connection, and dependent upon it for an outlet to the markets of the country, * * * but primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch.

In this case it is also recognized that the purpose of the statute was primarily to serve the shippers; and under the statute as it then read this court held that only shippers could ask for such a connection. Since that decision was rendered Congress, recognizing the fact that the lateral road, in such a matter, represented the shippers, amended the act so as to provide that the complaint might be filed by the lateral road. It still remains true, however, that the primary purpose of the act is to serve the shippers in a given territory who are not otherwise properly served.

Taking this view and giving this broad construction to the statute, the commission had power to

order in the switch connections, provided each connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same."

Whether the connection is practicable and safe, and whether there is sufficient business to warrant the expense, are questions of fact. Regarding the determination of these facts the act provides, "that the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor." These are not questions of law for the court to determine. As stated by this court in I. C. C. *v.* D. L. & W. R. R. Co. *supra*, "the statute creates a new right not existing outside of it"; and it provides a tribunal that is to determine the questions of fact.

This court has said, in several cases, that in the determination of these questions of fact arising under the act the conclusions of the Commission are final and not reviewable by the Commerce Court.

> *Baltimore & Ohio R. R.* v. *Pitcairn* (215 U. S. 481).
>
> *Int. Comm. Comm.* v. *D. L. & W. R. R.* (220 U. S. 235, 251).

Upon these questions of fact the Commission, after reviewing the evidence presented by the parties before it, and making a physical examination of the roads and their relation to each other for the purpose

of determining the practicability of the connection and the operation thereof, found as follows:

> A physical connection with the defendant, the Baltimore & Ohio Southwestern, at one time existed at Madeira and also at a point spoken of in the record as Hillsboro Junction. At the same time there was also a connection with the line of the Norfolk & Western at the latter point. * * * It is not to be doubted that it is reasonably practicable to restore these connections at those points or to put connections in elsewhere, or that when restored or put in elsewhere they can be operated with safety. Nor can it be doubted that there will be sufficient traffic to and from points on the line of the complainant reasonably to compensate the defendants for constructing, maintaining, and operating such switch connections with the complainant. (Record, pp. 11 and 22.)

The Commission further found:

> In conclusion we find that the complainant is entitled to a switch connection with the line of the defendant, the Baltimore & Ohio Southwestern Railroad Company, at Medeira, and to a switch connection at or near Hillsboro with the line of that defendant, as well as with the line of the Norfolk & Western Railway Company. (Record, pp. 15 and 16.)

And in the order it is provided:

> The expense of installing such connection to be borne by said complainant [the Traction Company].

The learned judge who wrote the opinion of the Commerce Court fell into a singular error by failing to discriminate between the two divisions of the case—the request for switch connections and the request for through routes, either one of which might have been the subject of a separate proceeding. The first complaint is under section 1, which provides for switch connections, the second is under section 15, which provides for through routes. There is no connection or interdependence between these two causes of action. Relief may be granted in either one without reference to the other; switch connections may be ordered in without any reference to the existence or nonexistence of through routes. Through routes may be established, and do exist, where there is no physical connection between the lines, the transfers being made by steamboats, lighters, trucks or other instrumentalities. Facts essential to relief in one case need not exist as to the other. The Commission discussed and determined each complaint separately as clearly appears in the report. Yet in the opinion of the Commerce Court (Record, p. 30) it is stated:

> In considering whether upon this showing the Cincinnati & Columbus Traction Company is a lateral branch railroad, within the meaning of the law, it is to be observed that, according to the test applied by the Commission, it is held to be such as to places and shippers along its line in the intermediate territory between Dodsonville and Boston, remote from and not sufficiently served by the trunk lines,

> but not as to those east or west of there, as the road approaches its termini, where this is not the case. But it is obvious that this is not and can not be the correct criterion. A road is or is not a lateral branch railroad, according to the relation which it bears to the line with which a switch connection is asked. And this relation is one of road to road, and not of shippers or territory. (Record, p. 30.)

The Commission applied no such test. It took up in its report, first, the application for a switch connection, considered the road as a whole, and reached its conclusions thereon independently and before considering the needs of particular stations for through routes. (Record, p. 12.) The Commission then proceeds to say: "The complainant *also demands*, as we understand the petition, through routes and through rates to and from all interstate points reached by the defendants' lines and their connections." It then considers the condition of the particular stations and discusses their needs for through routes; examines to see whether they have adequate through route connections over the main lines, *not with a view of determining whether the line of the Traction Company is a "lateral" line, but for the purpose of determining whether the Commission should order in through routes at these stations.* The Commerce Court evidently misconceived the nature and scope of the proceedings before the Commission and the purpose of the inquiry under each complaint.

The opinion of the Commerce Court proceeds upon another theory, which, if correct, would prevent connection with any lateral road. After calling attention to the fact that for some distance from each connection the stations or communities are severally served by the main line, the opinion says:

> For half this distance also one or other of the steam roads draws its local traffic from and serves substantially the same territory as the Traction Company. And so clearly are they within the limits named, c mpeting lines, that admittedly any attempt to consolidate the Traction Company with either of them would offend against the state if not the federal law. (Record, p. 30.)

This condition must exist as to every lateral line. If it operates to prevent the granting of the relief provided for in the statute, then the law becomes wholly ineffective and the construction destroys the statute. What is meant by the phrase "would offend against *the state* if not the federal law" is not apparent. This can not be the law.

Again, the Commerce Court says:

> It may be that some shippers along the line of the Traction Company's road are not so fully accommodated as they might be, as the case stands; and their needs are to be consulted to a certain extent without doubt. But this is not controlling, and their rights have necessarily to be worked out through the road for which in each instance a switch connection is sought, the character of which as a lateral

branch line is only incidentally affected thereby. (Record, p. 31.)

If the meaning of the last part of this quotation is understood, it must mean that the fact that a community is not adequately served with interstate transportation is not a very material matter in determining whether a road is a lateral road; that this question must be worked out mainly in reference to the larger roads whose local traffic may be slightly affected. This judicial attitude is very different from that taken by the State courts in the cases above cited. There the sole question seemed to be whether or not the communities and shippers were to be served, or better served, by the lateral road. One can not read the Federal act with an open mind without being impressed with the fact that Congress had in view primarily the interests of shippers, the growth of communities, the building up of the trade and commerce of the country. And if this be the purpose of the act, then the Commerce Court evidently erred in its conclusion above quoted.

Upon the authorities and for the reasons above cited, we respectfully submit that the Commerce Court erred in holding that the Traction Company was not a lateral, branch line railroad, within the meaning of section 1 of the act to regulate commerce.

As stated in the beginning of this brief, this is the only question decided by the Commerce Court, and upon which its decree is based. The power of the Commission to make the order in question is conceded, if the Traction Company's line is a lateral, branch

railroad. We therefore do not discuss other questions raised in the court below.

III.

The second order establishing through routes.

Section 15, as amended, among other things provides:

> The commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; * * *. The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, * * *.
>
> And in establishing such through route the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through

route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

As we have already noted this branch of the case is entirely separate and independent of the complaint asking for switch connections. The two complaints could have been brought in separate proceedings, or they could be, as they were, joined in one complaint. The orders, however, are separate orders under two independent provisions of the statute. It will be observed from a reading of the statute that the question whether the traction line is a lateral road has nothing whatever to do with the establishment of through routes and joint rates. These interstate routes and rates are not dependent upon the physical connection of the lines over which the through routes run. The transfer may be made through elevators, over docks, or by belt railroads, ferry boats, lighters, or drays. The decree of the Commerce Court, therefore, is clearly erroneous in suspending the order for through routes on the ground that the traction line is not, in the judgment of the Commerce Court, a lateral railroad.

Under this branch of the case, as stated by the Commission (Record, p. 12), there are only two conditions, namely, (a) the Commission may not require any railroad involuntarily to embrace in a through route substantially less than the entire length of its road between the termini of the proposed through route, and (b) it may not establish through routes

and joint rates between a steam railroad and a street electric passenger railway that does not transport freight and passengers. Neither of these limitations is violated by the order. The Commission in its report gives the reasons for establishing these through routes at particular stations on the traction line. Certainly the appellees can not object because the order does not establish through routes at every station upon the traction line. Eliminating the stations nearest the junction points was, as stated in the report, to protect the existing business of the main lines, these stations being adequately served by them. We do not discuss this question further, because the Commerce Court did not rest its decision upon this provision in the statute.

The exception made in favor of street electric railroads clearly shows that it was expected and intended that through routes and joint rates would be established between main-line roads and interurban electric roads. For, as Chief Justice Marshall so well reasoned with reference to powers granted to Congress by the Constitution of the United States, "Limitations of a power furnish a strong argument in favor of the existence of that power." *Gibbon* v. *Ogden*, supra. If the act to regulate commerce did not include electric railways doing freight and passenger business, there was no reason for excepting a particular class of electric railways from the power which Congress was then conferring upon the commission.

We respectfully submit that the Commerce Court erred in enjoining the order establishing through routes and joint rates.

Respectfully submitted.

CHARLES W. NEEDHAM,

Assistant Solicitor, Interstate Commerce Commission.

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No. 648. **OCTOBER TERM, 1912.**

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, CINCINNATI AND COLUMBUS TRACTION COMPANY and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY, Appellees.

Appeal from the United States Commerce Court—Transcript No. 23209.

BRIEF OF ARGUMENT FOR BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY, APPELLEES.

EDWARD BARTON,
Counsel for Baltimore and Ohio Southwestern R. R. Co.
JOSEPH I. DORAN,
THEODORE W. REATH,
F. MARKOE RIVINUS,
R. WALTON MOORE,
Counsel for Norfolk and Western Railway Company.

OCTOBER, 1912.

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IN THE

Supreme Court of the United States.

The United States of America, Cincinnati and Columbus Traction Company and Interstate Commerce Commission, Appellants,	October Term, 1912.
vs.	No. 648.
Baltimore and Ohio Southwestern Railroad Company and Norfolk and Western Railway Company, Appellees.	Appeal from the United States Commerce Court—Transcript No. 23209.

BRIEF OF ARGUMENT FOR BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY, APPELLEES.

STATEMENT OF THE CASE.

In some respects the statements of the case in the briefs filed for the Commission and for the United States in this case would seem insufficient to give this court an accurate picture of the case. To controvert the statements of the case appearing in those briefs we herewith submit our own statement of the case as permitted by sub-section 3 of Rule 21.

Upon complaint of the Cincinnati and Columbus Traction Company and, after hearing, the Interstate Commerce Commission made a report dated March 14th, 1911, and thereafter entered an order dated December 13th, 1911, which order will be found recited (Transcript of Record, page 41), in the petition of the steam railroad companies filed in the Commerce Court.

By this order the Baltimore and Ohio Southwestern Railroad Company was required to construct and operate during a period of not less than two years, switch connections for the transfer of interstate traffic at Madeira and Hillsboro, Ohio, the expense of such connections to be borne by the Traction Company; and a similar direction was addressed to the Norfolk and Western Railway Company for a switch connection at Hillsboro, Ohio. The order further directed both defendants to establish and put in force for a period of not less than two years through routes to and from interstate points to and from all points on the Traction Company's line between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points might have access to and from the interstate points by interchange of cars under through billing and through charges based upon the rates of the respective carriers to and from the junction points established by the order.

The steam roads, the Baltimore and Ohio Southwestern Railroad Company and the Norfolk and Western Railway Railroad Company, thereupon filed a petition in the United States Commerce Court (No. 60) on January 22nd, 1912, praying a preliminary injunction against the order of the Commission suspending the operation of the order and other further full relief. The case was heard by the United States Commerce Court on the petition for injunction of the steam roads, and the answers thereto of the Cincinnati & Columbus Traction Company and the Interstate Commerce Commission, and the motion of the United States to dismiss said petition. After this hearing and after the entry by the Commerce Court on

February 14th, 1912, of an order granting a preliminary injunction and denying the motion to dismiss, the Traction Company and the Interstate Commerce Commission withdrew their answers on the 17th February 1912, leave having been granted them to do so, and joined in and adopted the motion of the United States to dismiss the petition. The final decree entered April 19th, 1912, was made on the said petition, considered under the Rules of the Commerce Court as upon demurrer, that court being of opinion that upon the facts which were not in dispute as to this point the traction line was not a lateral, branch railroad as to the steam lines.

An abstract of the petition filed by the steam roads in the Commerce Court follows:

The first three paragraphs state the nature and business of the two steam railroads to be corporations to operate lines of railway in interstate commerce and describe the systems of railroad operated by said corporations in general and in particular those parts of the lines of the two companies which operate from Cincinnati or Norwood, a suburb of Cincinnati, to Hillsboro, Ohio.

The third paragraph avers that the petitioners have filed tariffs as provided by law with the Interstate Commerce Commission, prescribing rates for the transaction of their business of interstate commerce, and have been and are subject to the laws, rules and regulations prescribed by Congress or the Interstate Commerce Commission with respect to the operation and maintenance of their roads.

Three additional paragraphs are then devoted (Transcript, page 2) to a description of the corporation known as the Cincinnati and Columbus Traction Company and of the lines and business done by that company. Briefly stated the description is of a line of railway from Norwood, in Hamilton County, Ohio, through and across the counties of Hamilton, Clermont and Brown to and into the city of Hillsboro, in Highland County, without

crossing or intersecting or connecting with the line of either of the railroads of the petitioning steam roads and which "serves the same persons, municipalities, and communities that are served by these petitioners."

The next paragraph (Transcript, foot of page 2) sets forth that on November 12th, 1908, the Traction Company served written notice on the petitioners, demanding that they establish track connections and joint rates for the interchange of interstate traffic; and the next paragraph (Transcript, top of page 3) avers that the Traction Company did not make any other or further demand for track connections.

The next three paragraphs (Transcript, pages 3-4) recite the filing of complaint of the Traction Company with the Interstate Commerce Commission; the hearing thereon and the order, the terms of which have already been hereinbefore set forth.

Thereupon the petitioners the steam railroads, in their petition aver (Transcript, page 5) that because of the facts theretofore and thereafter alleged the order of the Commission was invalid and should be enjoined and wholly set aside and annulled for these reasons: (Transcript, pp. 5-8):

> 1. Because the Traction Company had no right or authority under the law of the State of Ohio to have its tracks connected with the steam railroads, being an interurban street railroad as distinguished from a steam railroad.
>
> 2. Because the Traction Company is not and never has been "such a lateral branch line of railroad as is contemplated by and described in the provision of the Act to Regulate Commerce relative to such track connections as were prayed for in the said proceeding and are prescribed by said order, and the said order is an attempted exercise by the Commission of powers which it does not possess."
>
> 3. Because at the time the proceeding was instituted there was no statutory provision authorizing the Com-

mission to entertain such a proceeding at the instance of the lateral, branch line of railroad.

4. Because the order is beyond the constitutional power of the Commission in that the order requires the petitioners to exchange equipment without providing for compensation for the loss or use of such equipment.

5. Because the uncontradicted evidence before the Commission was to the effect that the curves on the line of the Traction Company in Madisonville prohibit the operation of a freight car or cars without disregard of the safety appliance law and because at Milford the bridge clearance would render dangerous the operation of ordinary freight cars on the Traction Company's line.

6. Because the physical condition of the Traction Company's roadbed would render unsafe the operation of freight cars such as those used by petitioners on the line of the Traction Company; and in this connection the petition points out that petitioners, as initial carriers issuing bills of lading over the through routes, sought to be established by the order of the Commission, will be liable under the Carmack Amendment to Section 20 of the Act to Regulate Commerce for any loss, damage or injury to shipments caused by the Traction Company.

7. Because the accounts of the Traction Company show a deficit and earnings insufficient to pay operating expenses so that the steam roads should not be made to enter into traffic arrangements with a railway corporation not in a position to save harmless petitioners from the consequences of the responsibilities which the petitioners would inevitably be called upon to assume by complying with the order.

8. Because the Commission, as appears from its report, written by Commissioner Harlan and exhibited with the petition (Transcript, pages 8-16 and 20 I. C. C. R., 480), states that its conclusions as to the safety of the traction line for the use thereon of

> the steam roads' freight cars, etc., are based "more largely upon our own investigations" than upon testimony of witnesses who testified in the said proceeding.

With the petition as exhibits were a map showing the *locus* of the traction line and the two steam lines and of the stations, as well as some general features of the country, and a copy of the report of the Commission. On the page fronting this we have reproduced the essential features of this map in reduced size for convenient reference.

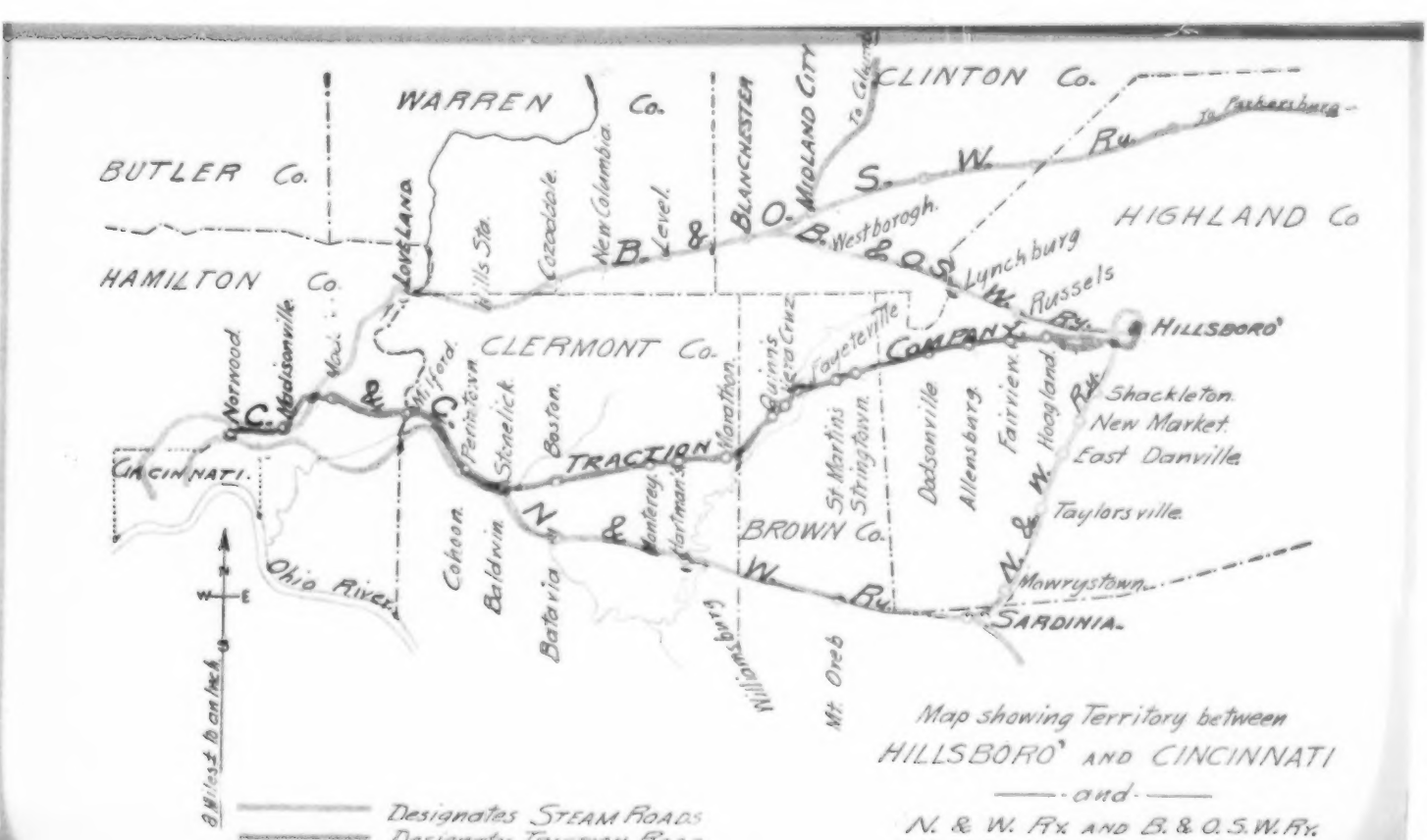
The statement is made in the brief for the United States, page 2-3, that the Traction Company "did have actual switch connections with both" of the lines of the appellees and that "these switch connections were removed (Transcript, page 111: "but in the year 1908 the Traction Company served upon both appellees a written request for their re-establishment." The mistaken impression is here given that what is sought in the present proceeding previously existed. The following sentence from the report of Commissioner Harlan (Transcript, page 111) shows the nature of the connections alluded to:

> "They were put in when the line of the complainant was under construction and were removed after its completion, apparently in accordance with a previous understanding to that effect."

These connections were removed in 1905, three years before the Traction Company made the request out of which the present proceedings arise.

On February 6th, 1912 (Transcript, pages 20-21), the Attorney General filed a motion of the United States to dismiss the petition.

On February 7th, 1912, the cause came on for further hearing on motion for preliminary injunction and the arguments of counsel were concluded; and on February 10th, 1912 (Transcript, page 22), the Court directed that



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put in tracks to connect with the Traction Company is that portion of Section 1 of the Act to Regulate Commerce as last amended by the Act of Congress of 18 June, 1910, 36 U. S. Statutes at Large, part 1, paragraph 3 on page 547, which declares that any common carrier subject to the provisions of the Act

> "upon application of any lateral, branch line of railroad, * * * shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

Then follows a provision that if the carrier fail to install and operate any such switch or connection on application therefor in writing by any shipper or the owner of any such lateral, branch line of railroad, then complaint may be made to the Commission which "shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order" directing the carrier to comply with the provisions of the Section.

This is the only power which the Interstate Commerce Commission has to order a switch connection. The general power to order switch connections between railroads rests with and is exercised by the States as in Wisconsin M. & P. R. Co. *vs.* Jacobson, 179 U. S. 287, and Oregon R. R. and Navigation Co *vs.* Fairchild *et al.*, 224 U. S. 510.

The Commission made a finding "that the complainant is entitled to a switch connection" (Report of Commis

sioner Harlan, Transcript, page 15) under the last paragraph of Section 1 of the Act to Regulate Commerce as amended by the Act of 18 June, 1910, which provides that in a proper case a carrier subject to the Act

> "shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad;"

and made another finding based on the legality of the previous finding

> "that the record justifies an order requiring the defendants to join with the complainant in establishing through routes,"

(Transcript, page 16), which last mentioned finding was under the third paragraph of Section 15 of the Act to Regulate Commerce as last amended 29 June, 1906. The proceeding in this case combined the exercise of these two powers. Unless the Traction Company has established that its line is a lateral, branch line of railroad under Section 1 and has thus established the right to a switch connection, then the Commission has no power to order through routes under Section 15. Section 15 does not authorize an order directing the construction of a connecting track.

But the Assistant Solicitor for the Interstate Commerce Commission contends that the establishment of "these interstate routes and rates" is "not dependent upon the physical connection of the lines over which the through routes run:" (page 32 of the brief for the Interstate Commerce Commission). He adds: "The transfer may be made through elevators, over docks, or by belt railroads, ferry boats, lighters or *drays*." (The italics are ours.) Stated as applying to the case at bar, the contention is that although there is no physical connection between the lines of the steam roads on the one hand and of the Traction Company

on the other, yet that the Fifteenth section of the Act to Regulate Commerce vests in the Commission the power to establish through routes and joint rates. The Fifteenth Section of the Act to Regulate Commerce as amended by the Act of 18 June, 1910, provides that:

> "The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or join classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line."

In the same section we find other provisions showing that only lines of connecting carriers were meant by Congress in vesting in the Commission the power to establish through routes and joint rates. For instance, we find the duty cast upon the primary carrier "to transfer said property over its own line or lines and deliver the same to a connecting line or lines according to such through route:" and the further "duty of each of said connecting carriers to receive said property" etc. Congress limited the grant to power to establish through routes and joint rates as to "connecting carriers:" "a connecting line or lines:" "each of said connecting carriers."

Only *connecting carriers* are affected. What is a connecting carrier? To "connect" is to join, unite, bind or fasten together.

In Atchison Railroad *vs.* Denver Railroad, 110 U. S. 667, this Court considered a constitutional provision in Colorado that every railroad company shall have the right with its road to "connect with * * * any other railroad," and held that only a mechanical union of the tracks of the

two roads so as to admit of the convenient passage of cars from the one to the other was intended. Mr. Chief Justice Waite said:

> "This clearly applies to the road as a physical structure, not to the corporation or its business."

Unless all the carriers whose lines are to constitute the through route are subject to the Act and hence to the jurisdiction of the Commission, the Commission has no power to establish a through route and rate. Draymen hauling between the stations of the steam carriers and the Traction Company in Hillsboro and Cincinnati would not be subject to the Act: *In re* Parmalee Company 12 I. C. C. R. 39.

The order of the Commission in the case at bar shows that the Commission recognized this limitation of its power. The report of the Commission (Transcript, page 16) was limited to an order directing the carriers to establish through rates on combination of existing tariffs and did not contemplate or provide for the cost of transfer by drayage. No draymen was a party to the proceedings. The order for a through route entered by the Commission was properly made by the Commission dependent upon the previous finding of the Commission on the other branch of the case that the Traction Line was a lateral branch line of railroad as to the two steam lines. The finding of the Commission in this case is inconsistent with the argument now for the first time advanced on behalf of the Commission that there is power to unite in a through route two carriers which are not physically united but must employ a drayman or local transfer agency not subject to the Act to Regulate Commerce to haul shipments and passengers from the terminal of one carrier to the terminal of the other.

We repeat that unless the Traction Company has established that its line is a lateral branch line of railroad as to the two steam roads there is no power vested in the Interstate Commerce Commission to establish through routes and joint rates between carriers who are not physically connected.

To recapitulate: unless the finding of the Commission that the Traction Line was a lateral, branch line of railroad is correct the second part of the order establishing through routes and rates is necessarily void for lack of power in the Commission to unite any but connecting carriers—that is to say, carriers which are in some way already connected.

Counsel for the United States at page 6 of their brief misapprehend the decision of the Commerce Court in averring that it was based upon a consideration of the angle at which the line of the Traction Company approaches the lines of the steam roads or that it involved a concession that the Traction Company is a competitor of the steam roads at or near its termini.

The question on which the Commerce Court decided the case, is whether on the facts set forth in the petition and exhibits the line of the Traction Company was a lateral, branch line of railroad as to the two steam lines. The meat of the Commerce Court's decision is to be found in the following quotation from its opinion (page 31):

> "The point here is that the Traction Company's road instead of being dependent or tributary is in its own peculiar sphere and as to both steam roads an equal, independent and competing line."

Upon this question the decision of this court announced by Mr. Justice Holmes in Interstate Commerce Commission *vs.* Delaware, Lackawanna & Western R. R. Co., 216 U. S. 531, strongly intimates a definition of "lateral, branch line of railroad," which would exclude such a line as that of the Traction Company. In that case Mr. Justice Holmes pointed out that "the object was not to give a roving commission to every road that might see fit to make a descent upon a main line," and also pointed out that there is force in the contention that the words of the statute "mean a railroad naturally tributary to the line of the common carrier ordered to make the connection, and dependent upon it for an outlet to the markets of the country." A competing interurban traction line is

neither "naturally tributary" nor "dependent upon" the steam lines "for an outlet to the markets" &c. The Commerce Court was largely influenced by the opinion in the Lackawanna case.

One of the counsel for the United States quoted from the opinion of Mr. Justice Holmes in the case last cited (216 U. S. at page 537):

> "On the other hand, it would be going far to lay down the universal proposition that a feeder might not be a lateral branch road of one line at one end, and of another at the other."

and urged that the Traction Company in the case at bar fell within the hypothetical case suggested by Mr. Justice Holmes, the argument being that the two steam roads in the case at bar "served different regions." But such an argument from the language of Mr. Justice Holmes overlooks the essential word which he has used to describe the lateral or branch line. He speaks of the lateral or branch line he has in mind as "a feeder." A competing railroad is not a feeder. As was said by Senator Spooner in defining the intention of the amendment:

> Mr. Spooner. * * * "It is not a competitor; only a feeder.
>
> Mr. Hale. It is a feeder?
>
> Mr. Spooner. That is all."
>
> (40 Congressional Record, page 7927.)

The Court will observe also that the argument for the Government on this point is that the serving of "different regions" by the two steam roads is decisive that the traction line is a lateral, branch line of one at one end and of the other at the other end. By this method the classification of a lateral, branch line of railroad would depend not on the tributary quality, the lack of market, the dependence, etc., of the applying railroad, but would depend upon qualities of the trunk lines to which the application is made. If anything is certain in this statute, it seems to be that the

phrase, "any lateral, branch line of railroad" occurring in the law must be defined by the character, location, opportunity to reach markets with its products, etc., of the applying company or carrier.

The Lackawanna case was decided upon a state of facts arising prior to the amendment by Act of Congress of 18 June, 1910, but the amendment only went to the character of the parties who might make application for relief and did not touch or affect the part of the statute which defined "lateral, branch line of railroad," and limited relief to the single case of a lateral, branch line of railroad.

Let us now refer to the facts with regard to the character of the traction line in the relation of that line to the lines of the two steam railroads. The map, which appears, facing page 6, shows the traction line in red and the two steam lines in green. Just here we may quote the facts as found by the Commission and appearing in the report of the Commission (Harlan, Commissioner, 20 I. C. C. Rep. 486-494), which report was Exhibit No. 2 with the petition of the petitioners in the Commerce Court:—

> "For a distance of about six miles eastwardly from Norwood the line of the complainant not only parallels the line of the Baltimore & Ohio Southwestern but practically adjoins the right of way of that defendant. A few miles farther to the east it approaches and at Perintown practically adjoins the right of way of the Norfolk & Western and parallels that road for a few miles to Stonelick, at which point it is only about a mile distant from the Norfolk & Western. Its station at Norwood also immediately adjoins the stations of the defendants, the Baltimore & Ohio Southwestern and the Cincinnati, Lebanon & Northern Railway Company. For a distance of some four or five miles out of Hillsboro, its eastern terminus, the complainant's

line again parallels the tracks of the Baltimore & Ohio Southwestern, the rights of way of the two lines being immediately adjoining."

The traction line is an independent, interurban traction line, operating between the same termini as the steam lines and lying physically between those two lines, and at no point is more distant than ten or twelve miles from one or the other of the steam lines. As to the East and West ends of the traction line that line is a local competitor at the same stations of one or other of the steam lines, as well as a through competitor between the same termini of both. The Traction Company has its own stations, local and terminal. The Report of Commissioner Harlan speaks of "its station at Norwood," (Transcript, page 12); and of "Hillsboro, its eastern terminus," (Transcript, page 12).

Can the line of the Traction Company by any reasonable definition of the phrase, "lateral, branch line of railroad," be deemed under these conceded facts to be a lateral branch line of railroad as to the two steam roads? This is a question of law which the Commerce Court in its opinion (Transcript of Record pages 25-31, inclusive), has answered in the negative, which decision is now before this Court for review.

A review of the legislative history of the "lateral, branch line" phrase in the act will demonstrate the intention of Congress. When the Conference Report came up in the Senate (page 7927 of the Congressional Record, Vol. 40) Senator Spooner explained the introduction by the Conference Committee of the words "any lateral, branch line of railroad" into the statute as enlarging "the class so as to take in the lateral branch lines of railroads with the shipper," and pointed out that the branch provision "deals with precisely the same subject," showing that a feeder railroad or a shipping railroad was intended by the phrase. Later in the same debate Senator Spooner explained the lateral railroad to mean a railroad "built from the side. It may be 20 miles; it may be 10 miles; it may

be 50 miles; it may be 100 miles;" as a railroad that "brings the trunk line business;" as a railroad that "is not a competitor; only a feeder;" and he then concluded with this explanation:—

> "MR. SPOONER.—A firm, a coal company, or a group of independent coal-mining companies are unable to get cars, they are unable to obtain switches, they are unable to connect with the line upon which they are dependent to get to market, and they may organize a little company and build 10 miles or 20 miles of railroad. Of course, it is a common carrier; it has to be. Constructing that road to a connection with the long line engaged in interstate commerce, there is every reason in the world why, upon fair terms, it should be permitted to connect with that railroad, so as to be able to secure an interchange of traffic and cars on fair terms."
>
> (Vol. 40 Cong. Record, page 7927.)

These explanations of the Conference Report in introducing this provision as to lateral, branch lines of railroad into the statute exclude the idea that an independent, competing line with its own termini and stations can ever be a lateral branch line as to its competitors.

There must be some closer relation between the branch road and the main line than ordinarily exists between two independent railroads which approach each other. The relation must include something more than the mere proximity of the terminus of one road to the line of the other. Otherwise one trunk line might well be held to be a lateral branch road with respect to another trunk line. We would have no sound distinction between a lateral branch railroad and other railroads referred to generally in the act. This would be contrary to the express language in the act which shows that such a distinction was contemplated by Congress.

What other conceivable definition of a lateral, branch railroad, as the term is used in the clause, can be adopted

than that it is a line of railroad, naturally tributary to the line of the "common carrier" and entirely dependent upon it for an outlet to the markets of the country?

In no other sense can one road be deemed a branch or part of another road. We thus give the ordinary meaning to the words "branch" and "lateral;" we draw an intelligible distinction between a lateral, branch line of railroad and other railroads referred to generally in the act, and we give effect to the object which Congress desired to accomplish by this clause (as we shall now endeavor to show more fully), namely, to give shippers located upon isolated branch roads, having no connections, an outlet to the markets of the country.

The purpose of the provision under discussion in Section 1 is to require a connection to be made for the benefit of roads such as lumber railroads, mining railroads, private railroads of one sort or another which otherwise would be unable to reach any market. Such railroads are lateral or branch railroads in the sense of being dependent; that is to say, dependent for an outlet to market upon the railroad or system of railroads with which the connection is sought.

Not dependence of management or ownership, not mere size, but dependence upon the railroad with which the connection is sought in the sense of having that railroad as the only outlet to the markets of the country is one controlling factor. Unless the railroad seeking connection is dependent upon the other railroad in the sense of not being in any other way able to obtain an outlet to the markets of the country it is not a lateral or branch railroad within the meaning of this statute.

In the brief of the Assistant Solicitor for the Interstate Commerce Commission are cited various decisions defining "lateral" or "branch" lines. We do not deny that these decisions are correct. But we assert that they support rather than overthrow the decision of the Commerce Court, that an interurban competing traction line operating between the same termini as the two steam rail-

roads and lying between them physically, is not a lateral, branch line of railroad. One example is worthy of note: At page 17 the Assistant Solicitor cites Blanton *vs.* R., F. & P. R. Co., 86 Va. 618; 10 S. E. 925, to the effect that a road which "serves as a feeder to the main stem" is a branch. A competing line is not a feeder. As was said by Senator Spooner, the lateral, branch line of railroad which Congress had in mind "is not a competitor; only a feeder:" (40 Con. R., page 7927, *supra.*)

And counsel for the United States (page 9 of their brief) quote Mr. Justice Holmes in the Lackawanna case *supra* that the object of the Act was "primarily at least to provide for shippers seeking an outlet," and erroneously translate "outlet" to mean "reasonable access to the main arteries of interstate commerce." But if this suggestion be considered of any importance, the answer is that upon the conceded facts shippers here had an outlet through the Traction Company, which is admitted by the demurrer to be a parallel, competing, self-sustaining line with its own stations, terminals, etc.

The line of the Traction Company in the case at bar is not dependent upon either of the petitioning steam roads "for an outlet to the markets of the country," and it is not possible that such a road or rather the part of the road selected by the Commission and covered by its through route order is within the statutory description. As was said by the Commerce Court in the case at bar (Transcript, page 30 and 195 Fed. Rep. at page 967):

> "Looking to the purpose of the law, a road is a lateral branch road when it is tributary to and dependent on another for an outlet; that is to say, where it is essentially a feeder, contributing traffic and capable of interchanging it therewith. It is not such where it is in effect an independent and competing line. Nor is this any less the case because it may not compete as to a portion of the territory involved. It is the general effect which decides, and that is not in doubt here. All three roads in the present instance have the same gen-

> eral east and west direction, and, so far as concerns Hillsboro on the east and Cincinnati or Norwood on the west, run between the same points. For half this distance also one or other of the steam roads draws its local traffic from and serves substantially the same territory as the traction company. And so clearly are they, within the limits named, competing lines, that admittedly any attempt to consolidate the traction company with either of them, would offend against the State if not the Federal law."

(b) A finding that a particular railroad is a "lateral, branch line of railroad," entails a duty upon the trunk line to "furnish cars for the movement of" traffic. A construction of the phrase which would include a competing line would involve the unconstitutional result that the steam roads would be obliged to furnish cars to the competing Traction Company and this without providing for adequate protection for return of the cars or compensation.

The paragraph of Section 1 of the Act to Regulate Commerce as amended 18 June, 1910, upon which the order rests, declares that any common carrier "upon application of any lateral, branch line of railroad" shall construct, maintain and operate a switch connection

> "with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; *and shall furnish cars for the movement of such traffic* to the best of its ability without discrimination in favor of or against any such shipper."

The discussion (brief U. S. pages 24, 25, etc.) as to the terms of the Commission's order with regard to car interchange is immaterial as the Statute regulates the matter and requires the carrier to furnish cars for traffic originating on the Traction Company's line.

In L. & N. R. R. Co. *vs.* Central Stock Yards Co., 212 U. S. 132, a provision in the constitution of Kentucky that a carrier must deliver its cars to connecting carriers, which provision did not provide for adequate protection for their return or compensation, was held to be a taking of property without due process of law forbidden by the 14th Amendment. In the opinion of the Court it was declared that any regulation of the interchange of cars "could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use." *Id.* 144.

The Norfolk & Western Railway Company and the Baltimore & Ohio Southwestern Railroad Company would under the order of the Commission, have been required by the statute and irrespective of the provisions of the order to "furnish cars for the movement of such traffic" (originating on the traction line or destined to the designated points on that line) "to the best of its ability," etc.

The truth is that the provision with regard to furnishing cars in this statute was enacted by Congress with reference only to those wholly dependent feeder lines which Congress had in mind in using the phrase "any lateral, branch line of railroad," and the provision as to car supply of such lines would be inappropriate and unconstitutional under the decisions of this Court if applied, as was done by the Commission's order in the case at bar, to a competing line.

POINT 2.

(Assignments of Errors II and VIII—Transcript of Record, Pages 35-36.)

The Commerce Court had jurisdiction to grant the injunction and to determine the question of law presented on the face of pleadings.

Since this case was decided below the jurisdiction of the Commerce Court has been authoritatively defined. That Court is endowed with the same jurisdiction and power existing at the time of the passage of the Act creating the Court in the Federal Circuit Courts: The Proctor & Gamble Company *vs.* United States (June 7, 1912), 225 U. S., 282. In another case decided three days later of United States *vs.* Baltimore & Ohio Railroad Company (June 10, 1912), 225 U. S., 306, the Chief Justice delivering the opinion pointed out that the Commerce Court was endowed, in considering whether an affirmative order of the Commission should be enforced or set aside, with "the jurisdiction and power existing at the time the Act was passed in the Circuit Court of the United States."

A decree of the Commerce Court granting a preliminary injunction to restrain an affirmative order of the Interstate Commerce Commission was affirmed.

We are not without a recent thorough explanation of the jurisdictional power (now vested in the Commerce Court) which was formerly in the Circuit Courts of the United States. In Interstate Commerce Commission *vs.* Union Pacific R. Co., 222 U. S. 541 (1912), Mr. Justice Lamar said, at page 547:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of

law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibitions against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

Counsel for the United States (at page 10 of their brief) assert that the finding of the Commission requiring a switch connection "is one of the very things in respect to which the Commission is especially trained and expert and intended to be final," thus contending that the question is one of fact. In this connection it must be remembered that the other side is here as upon demurrer and that all the matters well pleaded in the petition are admitted to be true including the facts which show the Traction line to be a parallel, competing and self-sustaining line with its own stations, terminals, etc. The Government and the Commission succeeded in excluding in the Commerce Court the evidence before the Commission; and it is not open to counsel for the Government now to contend, as on demurrer, that the facts are other than as stated in the petition. The finding of the Commission that the Traction line was entitled to switch connections and in that sense a lateral branch line was, as stated by Mr. Justice Lamar in the case last cited, "based upon a mistake of law."

The same misapprehension of the state of the record is shown in the brief of the Interstate Commission and also in the brief for the United States. Constantly our opponents appear to forget that the case is before this Court on bill and demurrer and that facts not appearing in the petition or bill may not now be considered.

Point 3.

(Some General Suggestions.)

The decree perpetuating the injunction must on demurrer to the petition be affirmed if on any ground the decree was warranted. Other grounds upon which the decree must be affirmed exist than that on which the Commerce Court expressly rested its decision, namely:

(a) The Commission did not as required by Section 1 of the Act "determine * * * reasonable compensation" for the steam lines.

(b) The Commission had no jurisdiction because no shipper made application in writing:

(c) The Commission or Congress cannot require an interchange of cars with a competing line and without providing for their return and compensation for their use.

(d) The order of the Commission is invalid because the foundation of the order was the independent investigation of the Commission not contemplated or permitted by the Commerce Act:

The brief of the Assistant Solicitor for the Interstate Commerce Commission contends (page 7 and page 33) that questions raised but not decided in the Commerce Court need not be discussed because "the only issue upon which the opinion and decree of the Commerce Court was based" was the question of law that upon the conceded facts the Traction Line was not a lateral, branch line of railroad. This position is incorrect. If on *any* ground the decree can be supported, then that decree will be affirmed. Accordingly, even if this Court should be of opinion that the definition of "Lateral, branch line of railroad" should include such a line as that of the Traction Company in the case at bar, still this Court will

be under the necessity of proceeding to consider and decide the other points of law which arise upon this record: and will affirm the decree if upon any of those points the decree was justified. Thus we are under the necessity of proceeding to a discussion of other points each of which, as we think, would alone justify affirmance.

(a) The Commission did not as required by Section 1 of the Act "determine * * * reasonable compensation" for the steam lines.

(*a*) The final sentence of the last paragraph of Section 10 of the Act to Regulate Commerce as amended 18 June, 1910, provides that after application in writing by the owner of a lateral, branch line of railroad, such owner may make complaint to the Commission and "the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor."

The order in the case at bar (set forth in full in the petition, Transcript, page 4) directed the Norfolk & Western to construct and for a period of not less than two years to maintain and operate a switch connection near Hillsboro, and directed the Baltimore & Ohio Southwestern to construct and thereafter to maintain and operate for not less than two years certain switch connections. In each instance the order provided "that the expense of installing such connection to be borne by said complainant," but the order did not require the complainant to install the connection. The steam lines had laid upon them the burden of installing, maintaining and operating the connection with a right of action over against the Traction Company for the expense of installation only.

Is a right of action that "reasonable compensation" which the Commission is by the Statute directed to determine? Is the taking of property and the substitution of a mere cause of action due process of law?

In Attorney General *vs.* Boston & Albany R. R. Co., 160 Mass. 62, 1893, the Massachusetts Statute requiring railroad companies to issue interchangeable mileage books was held unconstitutional, and Field, C. J., said at page 90:

> "The statute authorizing the taking must contain some provision for obtaining adequate indemnity. It is not enough to leave the owner to his action at law for damages."

As said in Bloodgood *vs.* Mohawk & Hutchinson R. R. Co., 18 Wendell, 9, 35:

> "The making of this compensation must be as absolutely certain, as that the property is taken. It must not be dependent on any hazard, casualty or contingency whatever."

The Commission decided that the steam Railroad Companies ought not to bear the expense of the track connections. Congress did not intend they should be required to bear that expense and take the risk of being reimbursed at the end of a lawsuit by a corporation whose financial responsibility was, to say the least, doubtful. Not only is the law plain in itself but any other construction would make it unconstitutional.

Waterbury vs. Platt Bros & Co., 76 Conn., 435, 440, and citations;

City of St. Louis *vs.* Hill, 116 Missouri, 527, 535, 536; cited by Justice Holmes in 212 United States at 144;

Commissioners of Beaufort County *vs.* Bonner, 153 North Carolina, 66, 68, 72, citing other North Carolina cases;

Connecticut River R. Co. *vs.* Commissioners of Franklin County, 127 Mass. 50, 52 to 57;

And see Louisville & Nashville R. R. Co. *vs.* Stock Yards Company, 212 United States, 132, 144, and cases cited.

The order conceding, as it necessarily does, that the expense of the track connections should not be borne by the Railroad Companies and making no provision whatever to protect them, but leaving them to take their chances in this respect brings the case directly within the ruling of this court in Missouri Pacific Ry. Co. *vs.* Nebraska, 217 United States, 196.

(b) The Commission had no jurisdiction because no shipper made application in writing.

(*b*) It is alleged in the petition and also appears from the report that the proceeding before the Commission was brought by the Traction Company; that subsequently two shippers addressed letters to the Traction Company authorizing the use of their names as co-complainants; that thereupon the Traction Company requested the Commission to make such persons co-complainants, and that no shipper ever made any application in writing to the petitioners, for a track connection, either in advance of the institution of the proceeding or during its progress. Under the statute, as it was at the time the proceeding was instituted, the jurisdiction of the Commission was conditioned upon an application in writing having been made by a shipper (I. C. C. *vs.* D. L. & W. R. Co., 216 U. S., 531), and no such application has been made.

Granting that the Commission is and should be liberal in allowing the right of intervention, it does not follow that jurisdiction attached upon the appearance in the case in the manner stated, of the two shippers mentioned. Their appearance availed nothing, since they had not complied with the statute by making an application in writing to either of the petitioners.

It is true that the statute was amended so as to allow an "owner of such lateral, branch line of railroad" claiming to be within its contemplation to file such a proceeding upon having made an application in writing, but it is not understood how this amendment

can be held to have cured the infirmity in the proceeding brought by the Traction Company. The Act to Regulate Commerce, *quoad* this matter, confers no authority upon the Commission except to investigate a complaint brought by a party competent to bring it; but the complaint in this instance was not brought by such a party, and there was therefore no real complaint in existence throughout the long period while the investigation was in progress.

There is no principle or reason upon which it can be held that a case either in a court or in an administrative tribunal, which, from a jurisdictional point of view, was a bad case, or rather no case at all, up to the time of the argument becomes a good case because there is a change in the law, while it is in progress, extending the jurisdiction.

As said in Jackson *vs.* Scandland, 65 Mississippi, 481, at 488:

> "It is settled that the facts which constitute the ground of a suit must exist at the time the suit is instituted; and it cannot be maintained by supplementing it with matter occurring after its institution."

Especially is this true, if as in the case at bar, the applicant shippers are mere dummies introduced as an afterthought to avoid the effect of the decision of this Court in the Lackawanna case.

(c) The Commission or Congress cannot require an interchange of cars with a competing line and without providing for their return and compensation for their use.

(*c*) In subdivision (*b*) of Point I we have pointed out the unconstitutional effect of the Commission's order in that the requirement to furnish cars follows from the statute itself if the traction line is a lateral branch. Equally would the order of the Commission be void if it require the

steam roads to deliver their cars to the Traction Company, or *vice versa*. The order (Transcript, page 24) requires through routes and rates to be established "in order that shippers * * * may have access to and from interstate points by interchange of cars under through billing and through charges."

In short, if the statute is construed to require the trunk lines to furnish cars to a competing line without protection as to compensation and return the statute would be unconstitutional; and on the other hand, if the order of the Commission accomplishes the same result, the order is void.

Of these three objections the Commerce Court (see opinion, Transcript of Record, page 28) said:

> "These are serious objections which would have to be carefully considered except for the conclusion which we have reached on the underlying question, viz., whether the traction company's road is a 'lateral, branch line of railroad' within the meaning of the statute, which, if found against that company, is conclusive."

(d) The order of the Commission is invalid becaues the foundation of the order was the independent investigation of the Commission not contemplated or permitted by the Commerce Act.

(*d*) The report of the Commission by Harlan, Commissioner (20 I. C. C. Reports 494) appears as Exhibit No. 2 with the Petition and is printed in full in the Transcript of Record. By reference to page 15 of the Transcript we find this language used by the Commission:

> "Giving due weight to the testimony of witnesses on each side of the controversy, *but basing our conclusions more largely upon our own investigations*, we think the complainant will have no difficulty in moving regular line equipment over its road."
>
> (Italics ours.)

Undoubtedly the Commission may take judicial notice of matters appropriate for judicial notice, but the Commission must base its findings upon the evidence and cannot base its findings upon its own investigations made without the knowledge and without opportunity to the carrier affected to cross-examine or controvert.

Before passing the argument of this point we direct attention to the assertion on page 28 of the brief for the United States that "Both the petitioners and Traction Company know that this point was being investigated" &c., the fact being, as on demurrer is admitted, that as stated in the petition (Tr. p. 8) "the petitioners were not advised of and do not know what investigations are referred to" (in the report of Commissioner Harlan) "or when or by whom they were made."

In Oregon R. R. & Nav. Co. *vs.* Fairchild (224 U. S. 510 cited above) this court by Mr. Justice Lamar on April 29, 1912, stated at page 525, first sentence, the limitation of due process as to the evidence in support of an order of a state commission requiring track connections, thus:

> "The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established."

As was said by the Commerce Court in Atlantic Coast Line R. Co. *vs.* Interstate Commerce Commission, 194 Fed. 449, 457, decided December 5, 1911:

> "The commission, in the investigation of any question, may bring to its solution the accumulated experience and expert knowledge of its members, and it would be its duty to do so, but before an existing rate may be condemned there must be a finding of some sort that it is unjust and unreasonable (Interstate Commerce Commission *vs.* Stickney, 215 U. S. 105, 30 Sup. Ct. 66, 54 L. Ed. 112), and this finding must be

based upon evidence of which the carrier is apprised so that it may meet the case brought against it if it so desires."

In Trustees of Saratoga Springs *vs.* Saratoga Gas E. & P. Co., 191 New York, 123, it was objected that the Public Service Commission law of New York was unconstitutional for the reason, among others, that it permitted just such independent investigation as the Interstate Commerce Commission appears to have made in the case at bar. But the Court of Appeals, in construing the statute, which was not substantially different from the Federal law with respect to hearing and notice, met this objection by construing the state legislation to require notice of all evidence considered. The Court said, 191 New York, 147:

> "It is also objected that any order made by the Commission may be based not only on the evidence and proceedings had at the public hearing provided by the statute as a prerequisite for making any order fixing maximum rates, but on the *ex parte* statement of the officers, agents, and inspectors of the commission, of which a company may have no knowledge, and to controvert which no opportunity is afforded. We do not so construe the statute."

After referring to several sections of the law, among them one expressly authorizing the Commission, by its agents and inspectors, to inspect the work, system, plants and books of a public service company, the court continued:

> "As we read the statute the investigation and report of agents and inspectors are to follow the filing of any complaint, and to precede or to be made during the public hearing. This is made clear by section 18, which provides that orders made by the commission on its own notice or without complaint shall be made only after reasonable notice to the corporation and reasonable opportunity to such corporation to prepare its de-

> fense or objection to the demands of the commission. It is plain that no corporation could make its defense until it was clearly notified of what was charged against it, and the proof to support such charge was given. While the commission might not be bound by technical rules of evidence, still it was plainly intended that the whole proceeding should assume a *quasi* judicial aspect. * * * The Commission being empowered to subpœna witnesses and take testimony, its inspectors or agents could be required to appear and verify any reports made by them; or, if we assume that such reports could be received in the first instance without verification, the inspectors or agents could be compelled to attend at the instance of either party, and be examined as to the truth of the statements in their reports and their knowledge of the facts therein contained."

In People *vs.* Public Service Commission (127 App. Div. 480) 112 New York Supplement, 133, a similar question was suggested and the court said at 135:

> "Ordinarily the Board of Railroad Commissioners is not subject to the same rules as to the admission of evidence as applies in a court of justice; and their proceedings should not be vacated for an erroneous ruling in rejecting or receiving evidence *except where such evidence might be controlling.*"

In Interstate Commerce Commission *vs.* Union Pacific R. Co., 222 U. S. 541, 547 (1912), Mr. Justice Lamar pointed out that questions of fact may be involved in the determination of questions of law so that an order of the Commission regular on its face may be set aside if it appears that "the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it."

If the Commission acts as in the case at bar "basing our conclusions more largely on our own investigation" than upon the testimony of witnesses, it becomes obvious

that the Commission's conclusions and order can never be re-examined and the question of law, which is with the courts, as Mr. Justice Lamar has said, can never be determined whether there is evidence to support the order.

In Oregon R. R. & N. Co. *vs.* Fairchild, 224 U. S. 510 (1912), the court examined the evidence which was urged to support an order of the State Railroad Commission requiring track connections between a railroad and a competing and parallel electric line at certain points for the interchange of business, and held, that the evidence did not sustain the order requiring the connection and accordingly was not due process of law required by the 14th Amendment. Mr. Justice Lamar delivered the opinion of the Supreme Court reversing the Supreme Court of the State of Washington and said at page 533:

> "The burden was on the commission to establish the allegations in the complaint. That body, as well as the carrier, was charged with notice that the reasonableness of the order was to be determined by what appeared at the hearing before it. The insufficiency of the evidence submitted to the commission could not, under this statute, be supplied on the judicial review by a presumption arising from the failure of the carrier to disprove what had not been established."

Congress as to due process is by the 5th Amendment subject in the enactment of the Interstate Commerce Act and the creation of the Interstate Commerce Commission to the same limitation of due process which is imposed upon the states by the 14th Amendment.

In this connection it becomes appropriate to notice the contention of the Assistant Solicitor for the Interstate Commerce Commission in his brief at page 25, that

> "Whether the connection is practicable and safe, and whether there is sufficient business to warrant the expense, are questions of fact"

exclusively for the Commission to determine. Truly these questions are questions of fact but the point in the case at bar is that the question whether the traction line was sufficient to carry the steam equipment (also a question of fact) was resolved more largely upon the *ex parte* investigations of the Commission than upon the testimony of the witnesses, so that the finding as to the fitness of the Traction line for the operation of the freight cars of the steam roads was not based upon the evidence and was for that reason illegal.

An order of the Interstate Commerce Commission not founded upon the evidence is not due process of law.

It is submitted that any one of the foregoing grounds would be sufficient on which to found the decree; and if this be so, then the decree must be affirmed, irrespective of the question as to lateral, branch line.

EDWARD BARTON,
Counsel for Baltimore & Ohio Southwestern R. R. Co.

JOSEPH I. DORAN,
THEODORE W. REATH,
F. MARKOE RIVINUS,
R. WALTON MOORE,
Counsel for Norfolk & Western Ry. Co.

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